TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 588

HENRY E. OPPENHEIMER, PETITIONER,

vs.

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK, ET AL.

No. 670

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK, PETITIONER,

vs.

HENRY E. OPPENHEIMER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONS FOR CERTIORARI FILED DECEMBER 22, 1936.

CERTIORARI GRANTED JANUARY 23, 1937. FEBRUARY 8, 1937.

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[fol. 1]

IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

HENRY E. OPPENHEIMER, Plaintiff,

against

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK and Henry E. Cooper as Conservator of the Harriman National Bank and Trust Company, Defendants

STATEMENT UNDER RULE XIII

The above entitled action was commenced by the service of the summons and complaint on the above named defendants on the 31st day of May, 1933. The defendants served an amended answer herein on the 6th day of July, 1933. The trial was had on the 4th, 7th and 8th days of October, 1935, before Judge Alfred C. Coxe and a jury. The defendants were not arrested, nor was any bail taken, nor was any property attached. No question was referred to a Commissioner, master or referee. Final judgment was entered on the 14th day of October, 1935. This appeal was allowed on the 30th day of November, 1935.

The names of the parties are given in full above and there has been no change in parties since the commencement of this action. On the 9th day of December, 1933, O'Brien, Boardman, Conboy, Memhard & Early, Esqs., were substituted as attorneys for the defendants herein in the place of Rushmore, Bisbee & Stern, Esqs.; and on the 16th day of August, 1935, Conboy, Hewitt, O'Brien & Boardman, Esqs., were substituted for O'Brien, Boardman, Conboy, Memhard & Early, Esqs.

[fol. 2] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUMMONS

To the Above-Named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a no-

tice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable, John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 26th day of May, A. D. 1933.

Charles Weiser, Clerk. (Seal.)

Greenbaum, Wolff & Ernst, Plaintiff's Attorneys, Office and Post Office Address, 285 Madison Avenue, Borough of Manhattan, City of New York.

[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

HENRY E. OPPENHEIMER, Plaintiff,

against

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK and Henry E. Cooper as Conservator of the Harriman National Bank and Trust Company, Defendants

COMPLAINT

The plaintiff, by Greenbaum, Wolff & Ernst, his attorneys, complaining of the defendants, alleges:

First. That the defendant, The Harriman National Bank and Trust Company of the City of New York is, and at all the times herein mentioned was a corporation duly organized and existing under and by virtue of the Acts of Congress providing for the organization of national banks, and having its principal place of business in the Borough of Manhattan, City and State of New York.

Second. On information and belief, that heretofore and prior to the commencement of this action Henry E. Cooper was duly appointed conservator of the defendant bank pursuant to the provisions of the Act of Congress commonly known as the "Bank Conservation Act" (Title II, Public Law No. 1, 73d Congress, March 9th, 1933) and that there-

[fol. 4] after said Henry E. Cooper duly qualified and is now acting as such conservator.

Third. That at all the times hereinafter mentioned plaintiff was and still is a depositor in the defendant bank, and that said Bank represented to its depositors that it was peculiarly well qualified to advise its depositors as to investments.

Fourth. That on and about the 1st day of November, 1930, the defendant, The Harriman National Bank and Trust Company of the City of New York stated and represented to the plaintiff that certain shares of the capital stock of the defendant bank belonging to a certain estate, the name whereof was not disclosed to the plaintiff, were being offered for sale; that the fair and reasonable value of said stock was $1512.00 per share; that the market price of said stock was $1500 a share bid and $1600.00 a share asked; and that said stock was not being offered for sale to the general public, but was offered to the plaintiff as a depositor.

Fifth. That plaintiff relying on the fact that said The Harriman National Bank and Trust Company of the City of New York had special and peculiar knowledge of the worth of the said stock which knowledge was not generally available, relied upon said representations and believed the same to be true and was induced thereby to and did on or about the 1st day of November, 1930, pay to the defendant, The Harriman National Bank and Trust Company of the City of New York, the sum of Fifteen thousand one hundred and twenty ($15,120.00) Dollars, and received in exchange therefor ten (10) shares of the capi-
[fol. 5] tal stock of The Harriman National Bank and Trust Company of the City of New York, represented by Certificate No. 4632.

Sixth. On information and belief that said representations and each of them were false and fraudulent and known to said defendant, The Harriman National Bank and Trust Company of the City of New York to be false in that the said shares of stock did not belong to an estate but in fact belonged to the said defendant, and that the fair and reasonable value of said stock was not $1512.00 per share but was worth considerably less than that sum, and that the said

market price as represented by the said defendant bank was not a true and bona fide market price, but was falsely and fraudulently procured by the said defendant bank to be published as the market price.

Seventh. On information and belief, the bid for said shares so represented by said defendant, The Harriman National Bank and Trust Company of the City of New York was a bid by or on account of The Harriman National Bank and Trust Company of the City of New York or procured to be published as the market price of said stock by the acts of said defendant bank, and that said defendant bank concealed such fact from the plaintiff, and that he was ignorant thereof until long after the purchase hereinafter alleged.

Eighth. On information and belief, that the said The Harriman National Bank and Trust Company of the City of New York, had, during the entire year of 1930 prior to November 1st, 1930, purchased large numbers of shares of its stock on a large number of different days, and that [fol. 6] the shares of stock so offered to plaintiff were shares which The Harriman National Bank and Trust Company of the City of New York had purchased and that all said facts were concealed by said bank and its officers from plaintiff, and that he was ignorant thereof until long after the purchase hereinafter alleged.

Ninth. That the said representations so made by the said defendant, The Harriman National Bank and Trust Company of the City of New York, were made with the intent to deceive the plaintiff and to induce him to purchase said shares of stock at the said price of $1512.00 per share.

Tenth. That thereafter and before the plaintiff discovered the falsity of the defendant's representations he received dividends on said stock amounting to $525.00.

Eleventh. That thereafter and before plaintiff discovered the falsity of the defendant's representations he sold two shares of said stock for the sum of Two thousand four hundred and eight ($2,408.00) Dollars and received from the said defendant bank stock certificate No. 7555 for the remaining eight shares of stock.

Twelfth. That thereafter, and on or about the 6th day of May, 1933, as soon as plaintiff discovered that the said

representations were untrue he elected to and did rescind the said transaction with the said The Harriman National Bank and Trust Company of the City of New York and duly notified the defendants and each of them of such election, and duly tendered to the defendants the said certificate of stock numbered 7555 and demanded of the defendants the repayment to him of Twelve thousand one hundred [fol. 7] and Eighty-Seven ($12,187.00) Dollars with interest thereon from November 1st, 1930, being the amount of the original payment less the $525.00 referred to in Paragraph "Tenth" and the $2,408.00 referred to in paragraph "Eleventh" herein.

Thirteenth. That defendants refused and still refuse to accept said stock and have failed and refused to pay to plaintiff the said sum or any part thereof.

Wherefore, plaintiff demands judgment against the defendants for the sum of Twelve Thousand One Hundred and Eighty-Seven ($12,187.00) Dollars, with interest from the 1st day of November, 1930, together with the costs and disbursements of this action.

Greenbaum, Wolff & Ernst, Attorneys for Plaintiff, Office and Post Office Address, 285 Madison Avenue, Borough of Manhattan, City of New York.

[fol. 8] *Duly sworn to by Henry E. Oppenheimer. Jurat omitted in printing.*

[fol. 9] In United States District Court

Amended Answer

The defendants above named, by Rushmore, Bisbee & Stern, their attorneys, for their amended answer to the complaint herein, allege:

1. Upon information and belief, deny each and every allegation contained in paragraphs "Third", "Fourth", "Fifth", Sixth", "Seventh", "Eighth", and "Ninth" of the complaint.

2. Upon information and belief, deny each and every allegation contained in paragraph "Tenth" of the complaint, except that they admit that the sum of $525. was paid to the

plaintiff as dividends on certain shares of stock of the defendant, The Harriman National Bank and Trust Company of the City of New York, registered in the name of the plaintiff.

3. Deny any knowledge or information thereof sufficient to form a belief with respect to any of the allegations contained in paragraph "Eleventh" of the complaint, except that they admit that a certain certificate bearing the number 7555, representing 8 shares of the stock of said The Harriman National Bank and Trust Company of the City of New York, was issued in the name of the plaintiff.

4. Deny each and every allegation contained in paragraph "Twelfth" of the complaint.

5. Deny any knowledge or information thereof sufficient to form a belief with respect to any of the allegations contained in paragraph "Thirteenth" of the complaint, except that they admit that the defendants refuse to accept the stock therein mentioned, and have failed and refuse to pay to the plaintiff he sum therein mentioned or any part thereof.

For a First, Separate, and Complete Defense:

6. Upon information and belief, that heretofore and long prior to the commencement of this action and prior to the [fol. 10] date of the alleged rescission mentioned in the complaint and of the alleged tender of stock to the defendants, the plaintiff had knowledge of all the acts and things complained of in the complaint and of the facts constituting the alleged fraud mentioned in the complaint or of facts which put him on notice of said alleged fraud, and that while in the possession of such knowledge, the plaintiff continued to treat as his own the shares of stock alleged in the complaint to have been purchased by him and continued to exercise acts of ownership with respect thereto, and ratified, approved, and confirmed the alleged purchase of said stock mentioned in the complaint.

For a Second, Separate, and Complete Defense:

7. The defendants here repeat and reiterate each and every allegation contained in paragraph "6" of this amended answer with the same force and effect as if here set forth in full.

8. Upon information and belief, that since the date of the alleged purchase of stock mentioned in the complaint and since the time when the plaintiff acquired the knowledge aforesaid, and long prior to the date of the alleged rescission mentioned in the complaint and of the alleged tender of stock to the defendants, said stock, to the knowledge of the plaintiff, declined in value, by reason whereof the plaintiff is estopped from bringing this action

Wherefore, defendants demand judgment, dismissing the complaint, together with the costs and disbursements of this action.

Rushmore, Bisbee & Stern, Attorneys for Defendants, Office & P. O. Address, No. 20 Pine Street, Borough of Manhattan, New York City.

[fol. 11] *Duly sworn to by Henry E. Cooper. Jurat omitted in printing.*

[fol. 12] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

HENRY E. OPPENHEIMER, Plaintiff,

against

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK and Henry E. Cooper as Conservator of the Harriman National Bank and Trust Company of the City of New York, Defendants

JUDGMENT

The issues in the above entitled action having been duly brought on for trial before Hon. Alfred C. Coxe, United States District Judge, and a jury, at a Term of this Court, held on the 4th, 7th, 8th days of October, 1935, and the issues having been duly tried, and both the plaintiff and the defendants having moved the Court for a directed verdict, and pursuant thereto a verdict for the defendants having been duly directed by the Court on the 8th day of October, 1935;

Now, on motion of Conboy, Hewitt, O'Brien & Boardman, attorneys for the defendants, it is

Adjudged that the defendants, The Harriman National Bank and Trust Company of the City of New York and

Henry E. Cooper, as Conservator of The Harriman National Bank and Trust Company of the City of New York, of No. 100 Park Row, in the Borough of Manhattan, City of [fol. 13] New York, have judgment against the plaintiff, Henry E. Oppenheimer, upon the issues in this action; and it is further

Adjudged, that the said defendants, The Harriman National Bank and Trust Company of the City of New York and Henry E. Cooper, as Conservator of The Harriman National Bank and Trust Company of the City of New York, recover of the plaintiff, Henry E. Oppenheimer, the sum of $30.00, the costs as taxed, and that said defendants have execution therefor.

Dated, New York, October 14, 1935.

Charles Weiser, Clerk.

[fol. 14] In United States District Court, Southern District of New York

[Title omitted]

Bill of Exceptions

Before Hon. Alfred C. Coxe, D. J., and a Jury

New York, October 4, 1935; 10:30 A. M.

Appearances:

Greenbaum, Wolff & Ernst, Esqrs., Attorneys for Plaintiff; Newman Levy, Esq., Edward S. Greenbaum, Esq., and Benjamin Kaplan, Esq., of Counsel.

Conboy, Hewitt, O'Brien & Boardman, Esqrs., Attorneys for Defendants; David Asch, Esq., William J. Butler, Esq., and Hobart L. Brinsmade, Esq., of Counsel.

A jury was impaneled, examined and duly sworn.

[fol. 15] Motion to Amend Answer

Mr. Asch: I now move to amend the answer, according to a notice which we have served.

Mr. Levy: And we object, your Honor, on the ground that the proposed amendment does not constitute a defense.

The Court: Well, I will not pass on that now. I will allow

the amendment to be made tentatively, and will reserve decision on whether I will let it stand.

Mr. Asch: May it be incorporated in the record?

The Court: Yes.

(Note.—The amendment to the answer, above referred to, appears in full below, as follows:)

"9. At all times since on or about March 4, 1933, the defendant, The Harriman National Bank and Trust Company of the City of New York, has been and now is insolvent.

"10. Subsequent to November 1st, 1930, defendant The Harriman National Bank and Trust Company of the City of New York, incurred debts, which said debts can not be paid out of the assets of the said defendant The Harriman National Bank and Trust Company of the City of New York."

(Opening Statements to the Jury on Behalf of the Plaintiff and Defendants are Omitted.)

Henry E. Oppenheimer, the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Levy:

Q. Mr. Oppenheimer, you are the plaintiff in this action, are you not?

A. I am.

[fol. 16] Q. And what is your occupation?

A. I am a retired merchant.

Q. What business were you in formerly, before you retired?

A. Importing precious stones.

Q. And what was the name of your business?

A. Henry E. Oppenheimer & Company.

Q. Henry E. Oppenheimer & Company was a trade name, was it not?

A. Registered, yes, in the County Clerk's Office.

Q. And who owned Henry E. Oppenheimer & Company?

A. At various times there were various partners. Of late, I have been the sole owner.

Q. Were you a depositor in the Harriman National Bank?

A. I was.

Henry E. Cooper, as Conservator of The Harriman National Bank and Trust Company of the City of New York, of No. 100 Park Row, in the Borough of Manhattan, City of [fol. 13] New York, have judgment against the plaintiff, Henry E. Oppenheimer, upon the issues in this action; and it is further

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Charles Weiser, Clerk.

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[fol. 16] Q. And what is your occupation?

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Q. What business were you in formerly, before you retired?

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Q. Henry E. Oppenheimer & Company was a trade name, was it not?

A. Registered, yes, in the County Clerk's Office.

Q. And who owned Henry E. Oppenheimer & Company?

A. At various times there were various partners. Of late, I have been the sole owner.

Q. Were you a depositor in the Harriman National Bank?

A. I was.

Q. And you had an account there in the name of Henry E. Oppenheimer & Company?

A. I did.

Q. At what branch?

A. The main office, 44th Street and Fifth Avenue.

Q. Were you acquainted with Mr. Joseph W. Harriman, the president of the Harriman National Bank?

A. I was.

Q. How long had you known him?

A. We went to school together; we were in the same school when we were boys. Then our roads diversed; and I met him again in later years.

Q. You met him when he became president of the Harriman National Bank?

A. No. I met him when we opened an account with the Harriman Bank.

Q. Now, let us get down to October 28, 1930. On that day did a gentleman named Williamson call on you?

A. Yes, sir.

Q. And did Mr. Williamson present to you a letter?

A. He did.

Q. I show you a letter and ask you whether this is the letter that was brought to you by Mr. Williamson on that [fol. 17] day (handing paper to witness)?

A. It is. (Handing paper to Mr. Levy.)

Mr. Levy: I offer this in evidence.

Mr. Asch: No objection.

(Paper marked Plaintiff's Exhibit No. 1.)

Mr. Levy: This is a letter, gentlemen, written on the engraved stationery of the Harriman National Bank and Trust Company, New York, and there is also engraved at the top "Office of the President," dated October 28, 1930, addressed to Mr. Henry E. Oppenheimer. (Reading to the jury Plaintiff's Exhibit No. 1.)

That is signed "Joseph W. Harriman," with the initials "JWH" typewritten at the bottom of the letter.

Q. Now, Mr. Oppenheimer, upon receipt of that letter, did Mr. Williamson introduce himself to you and tell you who he was?

A. He did.

Q. Suppose you tell us, as nearly as you can recall, what the entire conversation was; what he said to you and what you said to him.

A. Well, the conversation took about an hour, I should say. He introduced himself as a vice-president of the bank, speaking for Mr. Harriman. On reading that letter of introduction, I took it at its face value.

Mr. Asch: We object to that, and move to strike out that he took it at its face value.

The Court: Objection overruled. Motion denied.

Mr. Asch: Exception.

Q. Go on, Mr. Oppenheimer.

A. In other words, I believed what was written——

[fol. 18] Mr. Asch (interposing): We object to what he believed, and move that it be stricken out.

The Court: Objection overruled. Motion denied.

Mr. Asch: Exception.

The Witness: May I go on?

The Court: Yes.

Q. Yes, go ahead.

A. I believed the letter was written in perfect good faith; in other words, that there was something in the air; that he wanted to bring some of the depositors in line to get he same benefits as some stockholders had been getting. What they were, I didn't know. Then, Mr. Williamson spoke to me on that score——

Q. (Interposing.) What did he say to you?

A. In the first place, I told him I was not inclined to buy any stock, that I was not in condition to keep investments that were only paying two and one-half per cent.

Q. What did he say about the stock?

A. He asked me whether I would be inclined or whether I would buy some stock, and I told him I was not in position to carry a two and one-half per cent investment, which that was, he said; and then he told me that there was a chance of making more money on it; that it would improve; in other words, that they had cut a melon two and a half years previously, and he expected that they would cut another in eighteen months or two years; and consequently the investment would show more than two and a half per cent.

Q. Did he say anything to you about where the stock had come from?

A. He first discussed the market value of the stock, which was then quoted at $1500 or $1600—it was offered at $1600, [fol. 19] and $1500 bid, and he offered to sell me any part

of the 27 shares at $1,512 I think—stating that that was below the market; that while the stock was closely held, and could not be gotten in the regular market, that this stock came from an estate, which had 27 shares of it, and that is how he could offer it to me at that price. I am under the impression that he told me that the bank——

Mr. Asch: (Interposing.) One moment please. I move to strike out his impression.

Mr. Levy: All right.

Q. Tell us what you recollect—your best recollection?

A. May I state what my memory is?

Q. Yes, that is what I want.

A. As near as I remember, he said the bank was paying $1500 for the stock, and was giving it to me for $1,512. I still did not want it, but in the Harriman letter there was something there about "for mutual benefit" or "mutual advantage", and I thought I would take the stock and see what it came to, after he told me and assured me the stock was worth more than the $1600, but that was a market condition, he said, that existed at the time, and that all bank stocks that really had value——

Q. (Interposing.) Just tell us the rest of the conversation. What else did he say to you and what else did you say to him?

A. With reference to the financial condition?

Q. With reference to the subject-matter of the conversation; with reference to your buying stock, was there anything else said about that?

A. There was plenty said in that hour, yes.

Q. Well, tell us as much of it as you can recall.

A. It was mostly a discussion about the value of the stock.

[fol. 20] Q. And what did he say?

A. The stock at one time had been quoted at $2400. When it was quoted $1600, I naturally questioned the stock, and to that he said "Oh, that is all due to conditions; it is worth a great deal more money."

Q. What did you do about it then? What was the end of the conversation?

A. The end of the argument was that I took 10 shares of stock.

Q. Did you tell Mr. Williamson that you would take 10 shares of the stock?

A. I did. In other words, I think I said "you win" or something of that kind. I am not sure whether I signed a blank application for the stock or not. I think I might have.

Q. In saying to him "you win"——

A. (Interposing.) Or words to that effect.

Q. (Continuing.) —just what did you mean by that?

A. I meant "you win the argument."

Q. That he had convinced you?

A. Yes, that he had convinced me.

Q. And in making your decision to buy the stock, did you do that in reliance upon what Mr. Williamson had told you?

A. Altogether, yes.

Q. Altogether?

A. Yes.

Q. Now, the next thing—and if Mr. Asch does not object, I think we can move very quickly, if I might lead him over the preliminary matter——

Mr. Asch (interposing): Oh, yes.

Q. The next thing you did was to send a check to the bank for that purchase, is that right?

A. I think they sent me a bill first, and then I sent the check with the bill to be receipted.

Q. I show you a paper and ask you whether this was the bill that they sent you (handing paper to witness)?

[fol. 21] A. Yes, this is the bill (handing paper to Mr. Levy).

Mr. Levy: I offer this in evidence (handing paper to Mr. Asch).

Mr. Asch: No objection.

(Paper marked Plaintiff's Exhibit No. 2.)

Q. I think we might tell the jury that your eyesight has been bothering you lately, and that is the reason that we are not moving as rapidly as we would otherwise.

A. I think the jury notices it. I can tell you, gentlemen of the jury, that I can not see any place at all. I do not know what anyone looks like in the court room.

The Court: That is a rather unfortunate dilemma.

The Witness: Yes, it is the result of diabetes.

Q. You received this bill, did you?

A. Yes.

Q. I show you now a check and ask you whether this is your check that you mailed to the Harriman Bank (handing paper to witness)?

A. That is the check (handing paper to Mr. Levy).

Mr. Levy: I offer this in evidence (handing paper to Mr. Asch).

Mr. Asch: No objection.

(Paper marked Plaintiff's Exhibit No. 3.)

Q. When you mailed this check, Mr. Oppenheimer, you returned to the bank, did you not, this confirmation slip that has been marked in evidence as Plaintiff's Exhibit No. 2?

A. By that you mean the bill from the Harriman Bank?

Q. Yes.

A. Yes, I did.

[fol. 22] Q. And did you subsequently receive this bill, Plaintiff's Exhibit No. 2, with a rubber stamp on it, from the bank? Look at this rubber stamp (exhibiting). Was it sent back to you with this green rubber stamp on it on the other side (indicating)?

A. Yes.

Mr. Levy: I will read these to you, gentlemen. (Reading to the jury Plaintiff's Exhibits Nos. 2 and 3.)

Q. After mailing that check to the bank, Mr. Oppenheimer, did you receive a letter acknowledging receipt of the check, and is this that letter (handing paper to witness)?

A. I did.

Mr. Levy: I offer this in evidence (handing paper to Mr. Asch).

Mr. Asch: No objection.

(Paper marked Plaintiff's Exhibit No. 4.)

Mr. Levy: Gentlemen, this is on the stationery of The Harriman National Bank and Trust Company (reading to the jury Plaintiff's Exhibit No. 4).

Q. And after that did you receive the certificate of stock for ten shares?

A. Yes, sir.

Q. And was that certificate accompanied by this letter, which I now show you (handing witness paper)?

A. It was (handing paper to Mr. Levy).

Mr. Levy: I offer this in evidence (handing paper to Mr. Asch).

Mr. Asch: No objection.

(Paper marked Plaintiff's Exhibit No. 5.)

Mr. Levy: This letter, gentlemen, is also on the printed stationery or engraved stationery of the Harriman Na-
[fol. 23] tional Bank and Trust Company (reading to the jury Plaintiff's Exhibit No. 5.)

Q. Now, Mr. Oppenheimer, the certificate of stock that came with that letter for the ten shares, you haven't that certificate any longer, have you?

A. No, sir.

Q. You sold two shares subsequently?

A. Yes, two shares, and sent the original certificate to the Harriman Bank to break it up and give me an eight-share certificate.

Q. Did you receive any dividends at any time on this stock?

A. Three dividends.

Q. Amounting in all to how much?

A. $525, payable July and January; $175 each.

Q. Did you subsequently sell two shares of the stock which you had?

A. I did.

Q. And when was that?

A. I think it was in May, 1932.

Q. And how much did you sell them for?

A. On the first sale I got $1,208, and the second one, I think I got a little under $1,200—$1,190 and something.

Q. The total amount that you received for your two shares of stock was $2,408?

A. That is right.

Q. And when you sold that stock, you turned in your certificate for ten shares and received one back for eight shares?

A. Yes.

Q. And is this the certificate that you received for the eight shares of stock (handing witness paper)?

A. Yes.

Mr. Levy: I offer this in evidence (exhibiting paper to Mr. Asch).

Mr. Asch: No objection.

(Paper marked Plaintiff's Exhibit No. 6.)

[fol. 24] Q. Now, Mr. Oppenheimer, at the time you sold those two shares of stock, which you said was when? May?

A. May, 1932.

Q. May, 1932?

A. Yes.

Q. You sold that stock for less than you paid for it?

A. Yes.

Q. And did you have a conversation about that time with Mr. Joseph Harriman with reference to your sale of the stock?

Mr. Asch: We object to any conversation held at that time. There is no allegation in the complaint of any fraud other than in the inception of this transaction.

The Court: Was Mr. Harriman still the president of the bank at that time?

Mr. Levy: Yes, he was, at the time he had this conversation.

The Court: I will permit it.

Mr. Asch: Exception.

Q. Will you tell us what conversation you had with Mr. Harriman in May, 1932?

A. Within a few days after selling the two shares, I saw Mr. Joe Harriman and told him I had sold them, and asked him why the stock dropped from 1500 to 1200 within five or six days, and he simply said it was a market condition at the time, and he thought I was foolish to sell it, and that I should not have done it.

Q. Go on. What else did he say? You had quite a conversation with him at that time, did you not?

A. Yes, we had quite a conversation about the bank stock.

Q. And what did he tell you?

A. He said it was worth a great deal more; that the stock would all come back in about a year or a year and a half, [fol. 25] and I would regret the whole deal that I had made, if I sold it.

Q. So as a result of that conversation, you——

A. (Interposing.) I held the other eight shares.

Q. You held the other eight shares?

A. Yes.

Q. Now, did you have another conversation with Mr. Harriman with reference to the same subjects in October of that year?

A. When the shares dropped down——

Mr. Asch (interposing): We object to any conversations in October, 1932. Mr. Harriman at that time was no longer the president of the bank.

Mr. Levy: The purpose of this is that the defendant claims ratification; that Mr. Oppenheimer had full knowledge of the fraud perpetrated on him and did nothing about it; and I am endeavoring to show that he was lulled into security by Harriman.

The Court: But Harriman was no longer the president of the bank in October, 1932.

Mr. Levy: He was the chairman of the board at that time.

Mr. Asch: Yes, he was.

The Court: I will permit the testimony, if he was the chairman of the board.

Mr. Asch: Exception.

Q. Go ahead and tell us the conversation that you had with Mr. Harriman in October, 1932?

A. I called on Mr. Harriman after banking hours, when the stock had dropped from 1200 to 800, and I asked him whether he thought I should let it go, and he said, "no," that I should not; I should not sell my shares; that he himself had every share that he had ever bought. As I under-
[fol. 26] stood him at the time he had seven million dollars invested in Harriman Bank shares, and had never sold a share of it.

Q. Where did this conversation take place?

A. I will not put it by the dates, but I will by the market quotations—when the stock dropped from 1200 to 800.

Q. And where was it?

A. Oh, in their Fifth Avenue office.

Q. Did Mr. Harriman give any explanation why the stock had gone down?

A. Yes; he said that there was a trust company which held a large block of the stock as security—as collateral—and that they wanted to compel him, Mr. Harriman, to buy that stock, so that they were depressing the price; and he said he was not going to buy it, and he would wait until it got away down, and then he would pick it up for himself.

Q. Did he say anything else that you recall?

A. That's enough.

Q. Well, as result of that conversation what did you do or not do?

A. I held the stock, hoping that he was right.

Q. Now, I next want to call your attention to the spring of 1933, on an occasion when you saw something in a newspaper. Do you remember that?

A. I do.

Q. Will you tell us what it was?

A. I saw in the New York Times a notice of a suit brought by Mrs. Singleton——

Mr. Asch (interposing): We object to this as incompetent, irrelevant and immaterial, if your Honor please.

The Court: Objection overruled.

Mr. Asch: Exception.

[fol. 27] The Witness (continuing): brought by a Mrs. Singleton against the Harriman Bank, and I went——

Q. What was it about that notice in the newspaper that attracted your attention particularly?

A. That the facts that were—it was not a notice of suit, but notice of the suit and the fact that Mrs. Singleton was under this same misapprehension as I had been working under. In other words, I thought my letter was a personal letter written to me, but here I found it was just a facsimile of a letter sent to a lot of people, because she only bought two shares of stock.

Q. You mean a newspaper story and not a notice?

A. A report, it is called, I think.

Q. A report?

A. Yes.

Q. And upon reading that, what did you do about it?

A. I saw my lawyer.

Q. And who was your lawyer?

A. Mr. Edward Greenbaum.

Q. The gentleman seated at this table (indicating)?

A. Yes.

Q. Did you have a conversation with Mr. Greenbaum in reference to that matter then?

A. I certainly did. I told him I felt——

Mr. Asch (interposing): We object to the conversation, your Honor.

Mr. Levy: Yes. Never mind that.

Q. Did Mr. Greenbaum, shortly after that conversation, have a conversation with you in reference to the same matter?

A. Yes, sir.
Q. Shortly after your first visit?
A. He did.
Q. Now, on the occasion of your second visit did Mr. Greenbaum—and just answer this yes or no—did he tell [fol. 28] you whether or not he had made any investigation into the matter that you had brought to his attention?
A. Yes, sir.
Q. And did he report to you the result of his investigation?
A. Yes, sir.
Q. And what did he tell you?

Mr. Asch: Oh, I object to that.
The Court: Sustained.
Mr. Levy: All right.

A. He told me——
Q. (Interposing.) No. The objection is sustained.
A. All right.

Mr. Levy: My purpose in asking the question, your Honor——
The Court (interposing): Oh, I understand the purpose. We are getting into so much that is entirely extraneous to the issue in this case. What did you do after you talked with Mr. Greenbaum?
The Witness: The second time, your Honor?
The Court: At any time.
The Witness: I told Mr. Greenbaum——

Q. (Interposing.) No. What did you do?

The Court: Yes, what did you do about it? Did you sell your stock or try to sell it or what?
The Witness: Neither. I told Mr. Greenbaum to take steps to bring an action, to sue the bank.
Q. But before that did you ever meet the Conservator of the Harriman National Bank, Mr. Cooper?
[fol. 29] A. Yes, after the conversation with Mr. Greenbaum, I did.
Q. Did you call on Mr. Cooper?
A. I did.
Q. And on that occasion were you accompanied by me?
A. I was.

Q. And did you have a talk with Mr. Cooper at that time?

A. I did.

Q. Tell us what happened on the occasion of your visit to Mr. Cooper?

A. I tendered the eight shares of the bank stock to Mr. Cooper, and told him I was making a formal tender to cancel the entire contract of purchase and sale. I gave him a letter stating my position, with a carbon copy, and asked him to sign the receipt—the carbon copy as a receipt. He read the letter; he did not sign the carbon copy as a receipt, but he gave me another letter acknowledging the receipt of my service on him.

Q. And what did he do about accepting the stock which you tendered to him?

A. He refused to accept it.

Q. He refused to accept it?

A. Yes.

Q. Now, the letter that you presented to Mr. Cooper—I have served a notice to produce——

Mr. Asch (interposing): Have you a copy?

Mr. Levy: Yes, I have.

Mr. Asch: All right.

Mr. Levy: I offer this copy in evidence.

Mr. Asch: No objection.

(Paper marked Plaintiff's Exhibit No. 7.)

Mr. Levy: Gentlemen, this letter was presented by Mr. Oppenheimer to the Conservator of the bank, Mr. Henry E. Cooper (reading to the jury Plaintiff's Exhibit No. 7).

Mr. Asch: If the Court please, I of course made no objection to this letter, but may it be understood that it is [fol. 30] not proof of the facts recited therein, but simply that he delivered such a letter?

The Court: I receive the letter for what it is worth. We will take a recess here for a couple of minutes.

(Short informal recess.)

By Mr. Levy:

Q. Now, Mr. Oppenheimer, I will ask you one thing more: You still have the eight shares of stock, have you not?

A. I have.

Q. And was an assessment levied on you by the Controller of the Currency?

A. Yes, sir.

Mr. Asch: That is objected to as immaterial.

The Court: Objection sustained.

Mr. Levy: Exception, please.

Q. Just one thing more: Did you have any knowledge or information or intimation that the statements that had been made to you by Mr. Williamson and Mr. Harriman were untrue, prior to seeing the story in the newspaper about the Singleton case?

A. No, sir.

Mr. Asch: One moment. We object to that question, because it assumes that the statements made were untrue.

The Court: Objection overruled.

Mr. Asch: Exception.

Q. Just answer the question, please?

A. No, sir, I had not.

[fol. 31] Mr. Levy: Your witness.

Cross-examination.

By Mr. Asch:

Q. Had you other bank accounts besides the Harriman National Bank account?

A. Beg pardon?

Q. Did you, at the time you bought this stock, have other bank accounts besides the one in the Harriman Bank?

A. No, I did not—oh, yes; I had a personal bank account uptown—a housekeeping account.

Q. And you had had some experience with banks prior to that time, I take it, had you?

A. I had.

Q. Had you at any time bought bank stock other than the stock of the Harriman Bank?

A. I had.

Q. Do you still hold any of it?

A. No.

Q. What banks did you buy stock of, may I ask?

A. The Chase, the Irving, United States, Guaranty, and Midland Marine, and Royal Bank of Canada.

Q. About what time did you buy these various bank stocks?

A. 1929, most of them.

Q. Within a year prior to the time you bought the Harriman bank stock?

A. I think so.

Q. Did you buy some of them after you had bought the Harriman stock?

A. No, sir.

Q. Approximately how large were your holdings in the stock of other banks?

A. None of them were over ten thousand dollars or eleven thousand dollars.

Q. You also had various transactions in securities, other than this Harriman Bank stock, with or through the Harriman Bank, did you not?

A. Yes, sir.

Q. For instance, you had the Harriman Bank, on one occasion, sell some 60 shares of Equitable Trust Company [fol. 32] stock for you, did you not?

A. The Equitable?

Q. Equitable Gas bonds. Excuse me. Withdrawn. At one time you had the Harriman Bank sell some bonds of the Equitable Gas Light Company for you, did you not?

A. I may have. I don't recall.

Q. Do you recall——

A. (Interposing.) There might have been six bonds, but not sixty.

Q. Well, there were $6,000 worth?

A. All right.

Q. Do you recall anything about it?

A. I imagine I had them for a long time, and they came due, didn't they?

Q. See if that refreshes your recollection as to that transaction that you had with the bank (handing paper to witness)?

A. (After examining.) I should say these bonds matured, and they collected it for me.

Q. Do you recall receiving a slip such as that?

A. Oh, yes (handing paper to Mr. Asch).

Mr. Asch: Is there any question about this (handing paper to Mr. Levy)?

Mr. Levy: No.

Q. Of course, you did not sell these Equitable Gas Light bonds to the bank itself, did you?

A. I might have, at that.

Q. Well, have you any recollection about it (handing paper to witness)?

A. Oh, I see. They matured within sixty days of this date, so I sold them to the bank, and let them collect it.

Q. Don't you recall, Mr. Oppenheimer—and I will refresh your recollection, if I can—that you directed them to sell these gas light company bonds for your account?

A. The chances are I did.

[fol. 33] Q. And they were sold for your account, then?

A. I imagine so.

Mr. Asch: I now offer in evidence this slip.

Mr. Levy: I object to it as irrelevant and immaterial.

The Court: Objection overruled.

Mr. Levy: Exception.

(Paper marked Defendants' Exhibit A.)

Mr. Asch: Exhibit A, if I may state briefly to the jury, is a confirmation slip concerning the Equitable Gas Light Company bonds, which the witness has identified. (Reading to the jury Defendants' Exhibit A.)

The Witness: May I see that once more?

Q. Yes, surely (handing paper to witness).

A. All right. Thank you (handing paper to Mr. Asch).

Q. Now, during the period following the purchase of this stock of the Harriman Bank, did you follow the newspaper quotations of the stock of the Harriman Bank?

A. I followed most—yes, I followed the quotations on it.

Q. And you also, I take it, followed the quotations of the stocks of other banks in which you held stock?

A. Yes, that was the reason.

Q. And I assume that you knew that during this period following October, 1930, the prices of bank stocks were going down pretty generally, were they not?

A. Yes, I knew that.

Q. And then there came a time, did there not, in the spring of 1932 when there were no further quotations on the Harriman Bank stock; is not that so?

A. I am trying to recall 1932.

[fol. 34] Q. Well, I will put it another way: Did you observe the time when the Harriman stock ceased to be quoted?

A. In the fall of 1932 it ceased to be quoted, I think.

Q. The point of my question is this: You followed the quotations from time to time, and if at a certain time the papers ceased to quote them, you noted that fact, did you not?

A. Yes, I would have noticed that.

Q. If I may suggest, the fact is that the quotations ceased in July, 1932, and that being so, you would have noted it after that time?

A. Yes.

Q. Did you also note that for some weeks prior to the time that the quotations on Harriman Bank stock ceased, that the only quotations were the bid and the asked quotations?

A. Yes, sir, those are the only ones I saw.

Q. Did you know what the bond department of the Harriman Bank was—what its relationship generally to the Harriman Bank was?

A. I took for granted—no; but I took for granted that it was the bond department of the Harriman Bank and Trust Company.

Q. Did you not know, from your experience with banks, that departments which are named "the bond department" or that have similar names, are really the departments where they carry on investments for customers?

A. Yes.

Q. You knew that, did you not?

A. I did not know that they carried on investments for customers particularly, but their own affairs too.

Q. When you sent orders for the bank to deal in or to buy or to sell for you or to collect for you, do you recall what department you communicated with?

A. I do not. I generally went up to the fourth floor, which it turns out was the bond department.

[fol. 35] Q. So you went to the bond department when you wanted the bank either to sell or to buy securities for you or to collect on securities for you?

A. Yes.

Q. And, of course, you knew in those instances that you were not dealing with the bank as a principal? Do you understand the question?

A. I understand the question, yes, but I was dealing with the bank as a principal.

Q. When you went to the bond department of the bank

A. (Interposing) Yes.

Q. And told them to sell or, for instance, to collect on these Equitable Gas Light bonds?

A. According to that slip, I sold to the bank the Equitable Gas Light bonds. You have the sales slip there.

Q. But you are interpreting this. Do not let us get into any controversy. You knew at that time that the bank was not going to buy that for its own account, and put it in its portfolio, did you not?

A. I can not say that I knew that, no.

Q. You did not anticipate that they were putting this six thousand dollars worth of Equitable Gas Light bonds into their portfolio?

The Court: What difference does it make?

Mr. Asch: Because it is a parallel to this case.

The Court: But it is all speculation—that is, not in securities, but mental speculation.

Mr. Asch: He testified on direct examination that he thought about this other transaction, and I want to show that this transaction was the same.

The Court: Well, what he thought about the other transaction was permitted to go in evidence without objection.

[fol. 36] Mr. Asch: That may be. I think that has been sufficiently covered, however.

Q. I think you testified to the fact that in October, 1932, you went to Mr. Harriman and called his attention to the fact that the stock had dropped to 800?

A. Right.

Q. Is it not the fact that by September, 1932, the stock had dropped to 100 and to 90?

A. He was made chairman of the board about that time, was he not?

Q. In July he was made chairman of the board.

A. Yes, I will not place the date. In 1932, in the summer, I think I was in Europe.

Q. I do not want to press you unduly, but I would like to have about when this conversation with Mr. Harriman

A. (Interposing.) The first conversation took place when I sold the stock for 1200. Then, when the stock went down to 800, I saw him again. You have that date there. When

was it? What was the date that the stock dropped to 800?

Q. I am afraid I will not be permitted to tell you, but my record shows that soon thereafter it was down to 300, and then to 265, and then 188, and I have no record of eight shares. I would like to get the approximate date. I am not trying to argue or to trip you. I just want to get the facts straight.

A. All right.

Q. So I would like to know about when it was that you had this conversation with Mr. Harriman about $800 a share?

A. I think it must have been before October, 1932.

Q. As matter of fact, was it not before August, 1932?

A. Yes, it ought to have been before July, because it dropped down and went out of sight in October.

[fol. 37] Q. Is it not the fact that it was shortly after the time when you yourself sold it around $1,200?

A. I should say so. I should say back in June, from those facts.

Q. By the way, do you recall how large your bank deposit with the Harriman Bank was at or about the time you bought this stock?

A. Yes; it was somewhere over $30,000.

Q. And do you recall what your bank deposit was at the time the bank closed in March, 1933?

A. Very well. It was $6,700,

Mr. Asch: That is all.

Redirect examination.

By Mr. Levy:

Q. Just one question: You have testified to owning other bank stocks. Did you ever take any legal proceedings with reference to the other banks?

Mr. Asch: That is objected to.

The Court: Sustained.

Mr. Levy: Exception. That is all, Mr. Oppenheimer.

(Witness excused.)

COLLOQUY

Mr. Levy: Now, with the Court's permission, I would like to read the stipulation and the testimony which we have stipulated to read into the record.

The Court: How much is it?

Mr. Levy: Oh, there is a lot of it.

The Court: I renew my suggestion that perhaps we can eliminate reading a great deal of the testimony, on the ground, principally, that the Court might very well take judicial notice of most of the facts that have been brought [fol. 38] out in these other cases affecting the Harriman Bank.

Mr. Levy: I am perfectly willing to put any statement on the record that Mr. Asch and I can agree upon.

The Court: We might sit here for three or four days, and at the end of that time I have no doubt whatever that any reasonable person would come to the conclusion that misrepresentations were made by Mr. Harriman in connection with the sale of this stock and other stocks, and that a fraud was perpetrated. Now, I do not see that you can get much more than that. I have no doubt that that is what the proof is going to establish. I have seen it in other cases, and it has been proven in criminal proceedings against Harriman, and the facts have also been proved and recognized in other courts in this city, if not in this State. I do not know what more you are going to get by producing here and reading a record of all these different legal proceedings, and going over it over and over again.

Now, I do not know whether it is possible at this time to get some kind of concession which will obviate the necessity of going through all that. I have just as much patience as the rest of you, and probably as much as the jury have, and if they can stand it, then I can.

Mr. Asch: Your Honor understands, of course, that I have no brief for Harriman and do not make any claim that he was not crooked.

The Court: Then, probably in four or five lines you can cover the situation, and then comment on it before the jury, in the event the case is submitted to them.

Mr. Asch: Our point, of course, is that Harriman was not representing the bank in anything that he did here, and [fol. 39] that the bank got no benefit from it, and that the bank is not liable for anything he did. We can practically concede, for the purposes of the argument, that there was a fraud practiced by Harriman, if that will serve Mr. Levy's purpose?

The Court: My point is that it is not necessary for either of you to go to the trouble of reading verbatim all this tes-

timony, and that you can perhaps agree upon three or four lines or perhaps two or three pages which would cover the substance of all of it, or you may paraphrase it in your own language, and let it go at that; and in the end I have no doubt that the fact will be established that misrepresentations of fact were made, and that Mr. Oppenheimer relied on them, and that a fraud was perpetrated by Harriman.

Mr. Asch: That is, as between him and Harriman—between Mr. Oppenheimer and Mr. Harriman?

The Court: Yes.

Mr. Levy: Suppose I offer in evidence certain paragraphs, which I will refer to by number in the stipulation?

The Court: Why not offer the whole stipulation?

Mr. Levy: There are certain things that we have stipulated, to which I want to object on legal grounds.

The Court: All right, I will overrule your objections, and give you an exception.

Mr. Levy: I mean that certain facts are stipulated subject to their relevancy and materiality, which I deem to be irrelevant and immaterial. I will just read the numbers of the paragraphs and the exhibits that are referred to may be deemed to have been marked in evidence.

[fol. 40] The Court: All right.

Mr. Levy: And I will read them to the jury, if necessary.

I now offer in evidence the stipulation,* with reference to the following paragraphs:

Paragraph 1; paragraph 2; paragraph 3; paragraph 4; paragraph 5; paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 13-A, 14, 15, 16, 17, and paragraph 18 five and one-half lines, up to the figures "1931."

Mr. Asch: In connection with that offer, the balance of that paragraph deals with what he testified to on cross-examination.

Mr. Levy: All right. Then, the first paragraph of No. 18, and the second is matter of defense.

Mr. Asch: For or against whoever it may be, may not the whole paragraph be put in now, rather than putting it in piecemeal? It is matter of defense offered by me.

The Court: What paragraph is that?

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* This stipulation is marked herein Plaintiff's "Exhibit 8 with Exhibits Annexed Thereto"—so far as received on behalf of the plaintiff; and marked Defendants' Exhibit AA—so far as received on behalf of the defendants.

Mr. Asch: Eighteen.

The Court: What is the part that is offered?

Mr. Levy: I am offering the first paragraph of the 18th.

The Court: What is the purpose of it?

Mr. Asch: I would like to get through with the stipulation by offering, out of order, as it were, the balance of paragraph 18.

The Court: Do you object?

Mr. Levy: Yes, I object to that. I object on legal grounds to any evidence of any transactions relating to the Harriman Securities Corporation. It is our contention that Mr. Oppenheimer dealt with the bank, and never knew of the [fol. 41] existence of the Harriman Securities Corporation. The defense, as I understand, is that he was not dealing with the bank, but with the affiliate securities company. When the times comes, I want to object to that, and for that reason I am not offering that portion at the moment.

The Court: I think it would be better for you to finish with what you want to offer.

Mr. Asch: Then, I will reserve that for part of my case.

Mr. Levy: I have offered the first paragraph of No. 18, down to the words "transfer to him."

Now, the 19th paragraph, and the 20th, 21st, the 22nd, the 25th and the 26th. I have omitted the 23rd and 24th.

As I understand, all the testimony referred to is now incorporated in the record, and the exhibits referred to in those paragraphs of the stipulation are also incorporated?

The Court: If you understand so, I think I can understand it too—without reading them.

Mr. Levy: Yes, without reading them. That is our case. The plaintiff rests.

Plaintiff rests.

MOTION TO DISMISS

Mr. Asch: I now move to dismiss the complaint, if the Court please, on the ground that no cause of action has been proven against The Harriman National Bank and Trust Company of the City of New York or against Mr. Cooper, as Conservator thereof.

The Court: I will deny your motion at this time, with an exception to you.

Mr. Asch: Yes, exception. I now offer in evidence, if the [fol. 42] Court please, the balance of paragraph 18th of the stipulation referred to by counsel for the plaintiff.

Mr. Levy: I object to it, if the Court please, on the ground that it is incompetent, irrelevant and immaterial, and as this raises a legal question which goes to the essence of the case, I would like to be heard on it.

The Court: What is the particular materiality of that, as applied to this case?

Mr. Asch: The materiality is to show that all this stock which at any time was in the suspense account, that the dividends on that stock went to the Securities Corporation's account, and that it was a bona fide account of the Securities Corporation.

The Court: Is there connection made by the other testimony to show that all the stock, including the Oppenheimer stock and the Singleton stock, was treated in that fashion?

Mr. Asch: Oh, yes.

Mr. Levy: That is their contention.

The Court: Is there that connection by the other testimony which is in the case, which has not already been read? I do not know whether you get my point?

Mr. Levy: I do not think I understand.

The Court: Well, this paragraph 18th, which Mr. Asch now wishes to have incorporated in the record, as I understand applies to some stock owned by a man or a woman named Singleton——

Mr. Asch (Interposing): No. Pardon me. It applies equally to all the stock—Singleton and Jaskow and all of them. This particular certificate which Mr. Oppenheimer got came out of the name of Kelly.

The Court: All right. The objection is overruled.

[fol. 43] Mr. Levy: Exception. May I state the ground of my objection on the record?

The Court: Yes, certainly.

Mr. Levy: The admission of this in evidence is objected to by the plaintiff on the ground that The Harriman National Bank was either acting as principal or as an agent in this transaction. Now, if it was acting as principal, the internal transactions in the bank and its internal affairs with this Securities Corporation are irrelevant and have nothing to do with the issue before the Court.

If The Harriman National Bank was acting as an agent, it was acting, according to the testimony that has been presented here, as agent for an undisclosed principal. It is undisputed that Mr. Oppenheimer did not know the affiliate, the Securities Corporation, and that he thought he was dealing with The Harriman National Bank, and the letters in which the representations were made and the other documents were all on the stationery of the bank, and he dealt with officers of The Harriman National Bank, and never heard about the Securities Company at all. So if the bank was acting in this transaction as agent of the affiliate, it was acting for an undisclosed principal; and under the cases which I have presented to your Honor in my memorandum of law, the bank is now estopped from going behind that transaction to show that Mr. Oppenheimer was actually dealing with an undisclosed principal.

The Court: I understand your point fully, but I still adhere to my ruling. It seems to me that these are facts which the defendant has a perfect right to show, so that the entire transaction may be before the Court. As to [fol. 44] the legal effect of those facts, that is a different question, of course.

Mr. Levy: May I have an exception

The Court: Yes, certainly.

Mr. Asch: And I take it, if the Court please, that the checks which are referred to in paragraph 18 are to be regarded as in evidence, with the same effect as if marked again, so that they need not be offered separately?

The Court: Yes.

Mr. Asch: They are identified by the marks on them in the other case.

I now offer in evidence paragraphs numbered 23 and 24 from the stipulation.

Mr. Levy: And I object to those paragraphs, if the Court please. They relate to quotations on the stock of banks other than The Harriman National Bank, and I object on the ground that they are irrelevant and immaterial here.

The Court: Are those paragraphs 23 and 24?

Mr. Asch: Yes, sir.

The Court: What have the quotations with respect to other banks to do with this case?

Mr. Asch: It shows a general decline during most of this period, and then a sudden break in the Harriman stock, which took place in July, 1932.

The Court: I can not see that quotations with respect to banks other than the Harriman Bank are material here. And I will so rule. I will permit paragraphs numbers 23 and 24 to become part of the record in this case, but limited to the bid and asked prices on the Harriman stock, and the other quotations with respect to the Harriman Bank, but not the other banking institutions shown in those two paragraphs of the stipulation.

[fol. 45] Mr. Asch: I now offer in evidence, if the Court please, a deposit ticket dated July 7, 1930; another deposit ticket dated July 3, 1931, and a credit ticket dated January 3, 1931, showing the deposit to the credit of The Harriman Securities Corporation of the amounts involved in the checks which are referred to in paragraph 18 of the stipulation.

The Court: I assume that the ruling I have already made with respect to the balance of that paragraph 18 is applicable to this offer.

Mr. Levy: It will not be necessary for me to repeat my objection each time?

The Court: No.

Mr. Levy: I may have a blanket objection?

The Court: Yes, and I will overrule the objection and give you an exception.

Mr. Levy: I object on the further ground that these papers are not binding upon Mr. Oppenheimer. They relate to transactions between the bank and its affiliate.

The Court: Objection overruled.

Mr. Levy: Exception.

Mr. Asch: To further shorten the trial, may it be conceded that witnesses competent to testify, if called would testify that these deposits were actually made to the credit of The Harriman Securities Corporation?

The Court: I assume that is so.

Mr. Asch: Is that to be assumed, without stipulation, your Honor?

The Court: Yes.

Mr. Asch: All right. Now, please mark these (handing papers to the clerk).

(Papers marked collectively Defendants' Exhibits B.)

Mr. Asch: I do not know whether it will be conceded or [fol. 46] whether I shall have to proceed to prove that on

all transactions which took place in the suspense account, the charge for transfer stamps, documentary stamps, was made against the Securities Corporation, and either paid by way of a charge or by actual payment.

Mr. Levy: Our position is that Mr. Oppenheimer had no knowledge of what was going on between the bank and its affiliate. I assume that it is conceded that Mr. Oppenheimer was not acquainted with the transactions that the bank was having with its affiliate?

Mr. Asch: Oh, yes.

Mr. Levy: And so far as the transactions themselves are concerned, if Mr. Asch says that something happened at the bank, I will take his word for it.

The Court: It will not then be necessary to call anybody to establish those facts by testimony.

Mr. Asch: And I ask that it be conceded further that on all these transactions the Harriman Securities Corporation paid—of course, only on one side of the transactions—paid a commission to the bank for its services. Is that conceded?

Mr. Levy: Yes, that is conceded.

Mr. Asch: I also ask whether it will be conceded that the suspense account which we have referred to here was credited with the amount of the money received from Mr. Oppenheimer?

Mr. Levy: Yes; if you say that is the fact, we concede it.

Mr. Asch: So the suspense account shows (exhibiting paper to Mr. Levy).

Mr. Levy: All right.

Mr. Asch: Will it also be conceded that none of the shares [fol. 47] of Harriman Bank stock ever appeared in the investment portfolio of the Harriman Bank or in the book recording its investments, but did appear, from time to time, as it was cleaned out, as an investment of the Securities Company on the Securities Company's investment account or books?

Mr. Levy: Yes, that is conceded.

Mr. Asch: Will it also be conceded that during all the time at which or during which—the period at and following the period of the purchase by Mr. Oppenheimer of these shares, there was in force a note of the Harriman Securities Corporation to The Harriman National Bank and Trust Company, pledging certain collateral, not directly connected with this transaction, but which note also provided that

the Harriman Bank should have a general lien for any indebtedness for the Securities Company to it upon any property of the Securities Company which the Harriman Bank might have possession of?

Mr. Levy: That is conceded.

Mr. Asch: All right. Now, will it further be conceded that on March 3, 1933, The Harriman National Bank and Trust Company was insolvent?

Mr. Levy: What is the date?

Mr. Asch: The date of the bank holiday.

Mr. Levy: Oh, yes.

Mr. Asch: Will it further be conceded that after the purchase by Mr. Oppenheimer of the stock in question here, new creditors or creditors on new money came in to the bank in an amount exceeding some ten million dolllars?

Mr. Levy: Let me see. With respect to the last two concessions, I concede the facts, but I object to them on the ground that they are irrelevant and immaterial.

[fol. 48] The Court: What is the materiality of them?

Mr. Asch: They might become so. There are certain cases in which new money might become involved. The right of a stockholder to rescind is limited.

(Informal discussion among counsel and the Court, at the bench, off the record.)

The Court: I will overrule the objection, and give you an exception.

Mr. Levy: Yes, exception.

Mr. Asch: It is now five minutes to one o'clock, and the next concession I want to ask for involves some figures.

The Court: All right. We will take a recess until a quarter past two.

Recess.

(After Recess.)

2:15 P. M

Mr. Asch: May I ask Mr. Oppenheimer just one or two more questions?

The Court: Yes.

HENRY E. OPPENHEIMER, the plaintiff, recalled.

Further cross-examination.

By Mr. Asch:

Q. Mr. Oppenheimer, when you had the conversation with Mr. Williamson concerning the proposed purchase of stock by you, did he not mention to you that there was included in the sale something besides the stock of the Harriman Bank itself?

A. No, sir.

[fol. 49] Q. Didn't he tell you that the Securities Corporation had been making large profits?

A. He mentioned the Securities Corporation; he mentioned the affiliate; that is what he called it.

Q. And he told you at the time, did he not, that each share of stock of the Harriman Bank carried with it a participation in the Securities Corporation?

A. No, sir.

Q. When did you first learn that fact?

A. I never learned it.

Q. Did you examine your stock certificate when you received it?

A. I did not.

Q. The stock certificate that you first received was in the same form as the certificate you now hold for 8 shares, was it not?

A. Yes.

Q. Except for the ten shares and the date?

A. Yes.

Q. But he did mention the fact that there was a securities affiliate, did he not?

A. Yes.

Q. Now, I think you told me in your cross examination previously that you held stock in the Bank of United States?

A. I did.

Q. And they had a securities affiliate too, did they not?

A. I didn't know. May I say a word?

Q. Yes.

A. The other bank stocks, I went in the market and bought and sold. This was brought to me, and simply sold to me. I never bought Harriman Bank stocks in the regular market.

Q. You also held stock in the Chase Bank?

A. Right.

Q. And they had a securities affiliate?

A. No doubt. I guess they all had.

Q. And when you bought the stock of any one of these banks, had you not inquired or did you not find out what the function of the securities affiliate of the bank was?

A. No, sir.

Q. You knew nothing about that?

A. Nothing.

[fol. 50] Mr. Asch: All right. That is all.

(Witness excused.)

COLLOQUY

Mr. Asch: Now, instead of asking for a number of specific concessions, it may be that we can shorten this very materially if three concessions will be made, as follows:

First, that the Securities Corporation was an entity separate and apart from the Harriman Bank.

Mr. Levy: I concede that it was an entity. "Separate and apart" is a larger concession than I think I can make.

Mr. Asch: I may have to go into proof of the facts to establish that, if I can not get a concession.

The Court: It was a separate corporation.

Mr. Asch: Yes.

Mr. Levy: Just leave out "separate and apart".

The Court: All of the stock of which was owned either by the shareholders of the Harriman Bank or——

Mr. Asch: (Interposing.) That is not quite right. The entire stock of the Harriman Securities Corporation was held by trustees under an agreement, and each certificate of the Harriman Bank stock recited that the registered holder of the Harriman Bank stock was entitled to a beneficial interest in an equivalent amount of shares to that represented by the certificate of stock, of no par value, of the Harriman Securities Corporation, a New York corporation, under the terms of a certain agreement dated April 26, 1925, between these trustees and the subscribers.

Mr. Levy: The trust agreement is in evidence.

Mr. Asch: Yes.

The Court: I think that is sufficient.

[fol. 51] Mr. Asch: Then, secondly, that the stock sold to

Mr. Oppenheimer was sold by the Harriman Bank as agent for the Harriman Securities Corporation.

Mr. Levy: No, I will not concede that.

Mr. Asch: Then, I will have to go into the proof on that.

I ask whether the plaintiff will stipulate that the stock sold to the plaintiff came out of the Harriman Securities Corporation suspense account?

The Court: Well, you have all those facts——

Mr. Asch (interposing): I do not think we have that fact. In checking up, I think that is missing. I doubt very much if that is in the record. It is the fact, of course, but I doubt if the record shows it.

The Court: Well, if you have any doubt, I have not.

Mr. Levy: I think that is the fact, and I have no objection to conceding that.

Mr. Asch: All right. I ask whether they will stipulate that the stock in the suspense account was held by the Harriman Bank for the account of the Securities Corporation as a customer?

Mr. Levy: If you will omit the words "as a customer"

Mr. Asch (interposing): All right. It was held for the account of the Securities Corporation.

Mr. Levy: Yes.

Mr. Asch: And further that the Securities Corporation was the beneficial owner of the stock?

Mr. Levy: No; that is a conclusion. We can not concede that.

Mr. Asch: That from time to time all the stock held in the Harriman Securities Corporation suspense account was [fol. 52] actually transferred to the Securities Corporation for cash, either by way of check or by charge to its bank account.

Mr. Levy: Will you repeat that, please.

Mr. Asch: Let us have the reporter read it.

(Record read.)

Mr. Levy: I will concede that, yes.

Mr. Asch: That the Securities Corporation was a corporation engaged in the business of buying and selling securities for investment, and had done a large and substantial business in connection with securities of various kinds.

Mr. Levy: We concede that.

Mr. Asch: That at the time of the transaction with Mr. Oppenheimer, Mr. J. W. Harriman was the owner of about 2300 shares of the stock of The Harriman National Bank and Trust Company standing in his own name, and that the Jama Corporation, which was a wholly owned corporation —that is, which was a corporation wholly owned by Harriman and his immediate family—owned about 2550 shares, and that Mr. Williamson who has been mentioned here was the owner of about 142 shares.

Mr. Levy: I concede that.

Mr. Asch: And that the total outstanding shares were 20,000.

Mr. Levy: All right. That is conceded.

Mr. Asch: That the new creditors, previously referred to, who put in in excess of ten million dollars since Oppenheimer bought his stock, have not been paid in full.

Mr. Levy: I guess we will concede that.

Mr. Asch: And that the debit balance in the suspense account represented an indebtedness from the Securities Corporation to the bank.

Mr. Levy: Yes.

[fol. 53] Mr. Asch: That the assets of The Harriman National Bank and Trust Company are not sufficient to pay its creditors and depositors in full?

Mr. Levy: As to that, I will make the concession if I may be permitted to amplify it. I would like to have it appear in the record that a claim has been asserted by the Comptroller of the Currency against the clearing house banks to enforce their guarantee, and that the matter is now in liquidation, and in the event that the claim is settled favorably to the bank or the receiver of the bank, the creditors of the bank may all be paid in full.

Mr. Asch: I can not quite concede it in that form, because there is a serious question as to whether that guaranty applies to creditors, and not only to depositors.

Mr. Levy: In any event, the matter is now in litigation, and I can not concede the fact that they will not be paid in full.

Mr. Asch: Will it be conceded—and I think it will be——

The Court (interposing): Up to the present time, the depositors of the bank have not been paid in full?

Mr. Asch: No.

The Court: And a letter has been sent out by the Comp-

troller of the Currency levying an assessment against the stockholders?

Mr. Asch: Yes, for the full amount.

The Court: Those two facts, I think, are sufficient.

Mr. Asch: Yes, I think so.

Mr. Levy: In connection with that, may it appear in the record that Mr. Oppenheimer has paid his assessment in full?

Mr. Asch: I do not think it is material, but it may appear in the record, subject to my objection as to its materiality. [fol. 54] Mr. Levy: Without waiving any rights in this present litigation.

Mr. Asch: It will also be conceded, I think, that Frederick V. Goess was duly appointed receiver and qualified as such in November, 1933, and is still acting as such?

Mr. Levy: Yes.

Mr. Asch: That is, receiver of The Harriman National Bank and Trust Company, as liquidator of the bank.

Mr. Levy: Yes.

Mr. Asch: And that seems to complete it. Yes, that completes my case, Mr. Levy.

Mr. Levy: It is understood, of course, that all these concessions that I have just made are subject to the blanket objection I made at the beginning as to relevancy and materiality?

The Court: Yes.

Mr. Levy: And I have an exception on that ground?

The Court: Yes.

Mr. Levy: Now, I am going to ask if Mr. Asch will concede that Mr. Colombo, the bookkeeper of The Harriman National Bank and of the Securities Corporation, if he were called as a witness, would testify to certain testimony which I would like to read.

Mr. Asch: If you will show me where it is——

Mr. Levy (interposing): Starting at page 190.

Mr. Asch: If you will just indicate what it is——

Mr. Levy (interposing): I will state the substance of his testimony, and perhaps we can get a concession.

Mr. Colombo testified that on a number of occasions during the year 1930, starting with January 31, 1930, the Harriman Securities Corporation suspense account was [fol. 55] cleaned out and was closed out completely, and subsequently in July, and then again later in the year.

Now, each of those transactions came about in this way: The suspense account on these various occasions had stock of the Harriman Bank in it. The bank was advised that on those dates referred to national bank examiners were coming around to examine the bank, and on these dates the Harriman Securities Corporation borrowed various sums of money from The Harriman National Bank.

On July 31, 1930, they borrowed $20,000, and with that $20,000 they purchased 13 2/3 shares of The Harriman National Bank and Trust Company stock for $18,850. So that when the bank examiners came around, there was no Harriman Bank stock in the suspense account; it was all in the affiliate account. After the bank examiners had concluded their examination, the transaction was reversed, and the stock was transferred back to the bank, and the loan was repaid.

That appeared on January 31, 1930; then again on June 13, 1930, the suspense account was again——

Mr. Asch (interposing): What page?

Mr. Levy: Page 193 and following pages. On the morning of June 13, 1930, there was a cash balance of $13,767. The books indicate that there was a loan put on by The Harriman National Bank in the amount of $100,000—a Harriman National Bank loan of $100,000 to the Securities Corporation on that date; and on that date, with the money that they borrowed from the bank, the Securities Corporation, according to this testimony, purchased 62 shares of Harriman Bank stock, so when the bank examiner came [fol. 56] around there was no more bank stock left in the suspense account. I am in error as to that. On that occasion the examination was not made by a national bank examiner, but by a firm of accountants, who were auditors of the bank—Hurdman & Cranston.

Now, on the 3rd of July, 1930 the suspense account was again closed out. On the 3rd of July Mr. Colombo testified that it appears from the books of the Securities Corporation that on July 3rd it purchased from the bond department of The Harriman National Bank 146 shares of Harriman Bank stock, in the amount of $218,698.50, and that money was borrowed from the bank, and on that date, on the 3rd of July, 1930, an examination was conducted by the national bank examiners under Mr. W. F. Sheehan, head examiner, and there was a reversal of that transaction, and the 62 shares were resold to the bond department, and that with the

moneys or proceeds of that transaction the loan was repaid to the Harriman National Bank.

Mr. Asch: I can not concede it quite in that form. Mr. Colombo testified—and this testimony is referred to here, and was given by Mr. Colombo on the criminal trial of Mr. Harriman, but that testimony was simply Mr. Colombo's interpretation at the time from the books. He was not testifying to facts. I can not concede that on various occasions——

Mr. Levy (interposing): I am reading the gist of it.

Mr. Asch: I know, but that is where he was asked what he testified to on the criminal trial, and not on the Jaskow trial, and it appeared on the Jaskow trial that when he had testified in the criminal case, he was only giving his own [fol. 57] interpretation of certain entries. I will concede, that at various times when a bank examiner was coming in, the Securities account was cleaned out. I will not concede, however, that that cleaning out was by a sale to the Securities Corporation. It was, in fact, as the records which we have in evidence show, a payment at that time by the Securities Corporation of the debit balance which then stood against them; and by the same token, when any stock was transferred in to the Securities Corporation, it was not a sale to the Harriman Bank at all, but a transfer to the securities account, and with a credit balance in favor of the Securities Corporation.

Mr. Levy: You concede, of course, that the money was borrowed?

Mr. Asch: I concede that certain of the money was borrowed from the bank. There is no question about that.

The Court: It was merely a paper transaction, and I suppose it is a conclusion to be derived——

Mr. Asch (interposing): Exactly.

Mr. Levy: And the transaction would subsequently be reversed.

Mr. Asch: Of course, another thing is the inference from what Mr. Levy read, that all of the cleaning out or striking of balances occurred at the time of the bank's examination—and that is not so. Some of them happened to occur at those times. Of course, we would argue that that was the natural thing to do.

Mr. Levy: It is also conceded that these transactions were reversed shortly after?

Mr. Asch: I am not certain of that. It may be, but subject to correction, I will concede that thereafter certain of them went back into the account. I am not certain of that.

[fol. 58] Mr. Levy: Is the account in evidence?

Mr. Asch: The suspense account?

Mr. Levy: Yes.

Mr. Asch: I do not think so.* I would like one more concession,—that Mr. Goess, the receiver, if called as a witness, would qualify as an experienced banker, and would testify that the designation "suspense account" was a proper designation for the account which was carried by the bank for the benefit of the Securities Corporation,—indicating by that name that such account was not being cleared each day, but for the convenience of the customer was carried over and cleared only at certain periods. I ask for that concession in this case.

Mr. Levy: Yes, that is right.

Mr. Asch: All right, that is all.

The Court: I understand that both sides rest?

Mr. Levy: I have one or two more questions of Mr. Oppenheimer, if I may.

The Court: All right.

HENRY E. OPPENHEIMER, recalled.

Redirect examintion.

By Mr. Levy:

Q. Mr. Oppenheimer, at the time you bought the stock which has been testified to in this case, did you understand that you were dealing with the Harriman Securities Corporation?

A. No, sir.

[fol. 59] Mr. Asch: That is objected to as immaterial, if your Honor please.

The Court: I will permit him to testify as to what he did understand.

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*Certain excerpts from the suspense account are to be deemed in evidence, pursuant to stipulation of counsel, infra, p. 146. Those excerpts are printed herein at pp. 147-148.

Q. Will you tell us what you did understand with reference to that?

A. That I was dealing with the Harriman Bank—the Harriman National Bank and Trust Company.

Q. Did you know of the existence of the securities affiliate?

A. I didn't know anything about it. My first knowledge was when I came here this morning and heard Mr. Asch mention their name. I didn't know what they were called. There was talk that there was an affiliate corporation. That is what he said. I heard of that twice in four or five years, but nothing authentic; nothing but gossip.

Q. And it was your understanding that you were dealing with the Harriman National Bank?

A. Only.

Q. Only?

A. Yes.

Q. Did Mr. Williamson ever mention the securities affiliate to you as the seller of this stock?

A. No, sir.

Q. Did he ever communicate with you in any way at any time——

A. (Interposing.) Decidedly not.

Q. Or did anyone from the bank communicate with you with reference to the affiliate?

A. Not at all.

Q. Did you ever receive any communication from the Securities Corporation?

A. None whatsoever.

Q. At any time at all?

A. Never.

Mr. Levy: That is all.

[fol. 60] Recross-examination.

By Mr. Asch:

Q. I think you told me before that the securities affiliate was mentioned in your talk with Mr. Williamson?

A. He mentioned that there was an affiliate corporation, but who held it or how it was held or the name of it or where their offices were, he never told me.

Mr. Asch: All right. That is all.

Mr. Levy: That is all.

(Witness excused.)

Mr. Levy: The plaintiff rests.
Mr. Asch: The defendants rest.
The Court: Then, the record shows that both sides rest.

MOTION TO DISMISS

Mr. Asch: Yes. I now move to dismiss the complaint herein on the ground that the plaintiff has not shown that Mr. Harriman or Mr. Williamson were authorized to represent the bank in making these statements that they made to Mr. Oppenheimer; that on the proof, the bank did not obtain the benefit of the money received from Mr. Oppenheimer.

MOTION FOR DIRECTION OF VERDICT

I also move to direct a verdict, on the same grounds, upon the evidence as it appears here. There is no agency for the bank on the part of Harriman or Williamson established, and on the ground that the bank did not receive the money from Mr. Oppenheimer; and, of course, no rescission could lie against anyone except the person who received the money; and also that no claim can be made against the bank for a fraudulent representation made by [fol. 61] one of its officers, unless the bank received the benefit of that representation—and on the evidence here, the bank did not receive such benefit; and on the further ground that in view of the insolvency of the bank and the appointment of a conservator prior to the date of the claimed rescission, no rescission can lie.

The Court: Do you wish to discuss this question now? I mean, do you wish to discuss it as a question of law? I should think that might be helpful.

Mr. Asch: I thing that might be well. However, I do not know that I could say much more to your Honor than is contained in the opinion, handed up to you by Mr. Justice Dore.

The Court: I think it would be helpful, from my standpoint, to have oral discussion at this time; and I can see no particular necessity for having the jury stay here and listen to that discussion.

Mr. Asch: No.

The Court: There has been a suggestion that next Mon-

day is a holiday. I do not know how you gentlemen feel about taking a holiday on Monday. I am willing to leave it entirely in your hands.

We will take a recess now for a few minutes, and meanwhile you can talk that over amongst yourselves, as to whether you prefer to come back here on Monday morning or on Tuesday morning of next week. I leave it entirely in your hands, and when you come to a conclusion let me know, or let the clerk know, and we will take a recess until whatever time you say—whatever it may be.

(Informal recess.)

The Court: I understand that the jurors prefer to come back here Monday morning.

[fol. 62] Mr. Levy: Yes, sir.

The Court: All right. I will excuse the jury, then, until Monday at half-past ten.

(Whereupon, the jury was excused until Monday, October 7, 1935, at 10:30 o'clock A. M.)

MOTION FOR DIRECTION OF VERDICT

Mr. Levy: Your Honor, I intended to move for the direction of a verdict in this case. I do not know whether I should make my motion until after your Honor has passed upon Mr. Asch's motion, or whether you care to reserve decision on that.

The Court: I would like to get your contentions on the law, and whatever authorities you have to cite. I should think if you are going to make a motion for the direction of a verdict it might be proper for you to make it now.

Mr. Levy: All right. The plaintiff moves for the direction of a verdict for the amount stated in the complaint, with interest.

The Court: All right. Are you ready and willing to discuss this now?

Mr. Levy: Yes, I think I would like to, if your Honor will hear us.

The Court: All right. I do not think the reporter need stay any longer. You may go Mr. Reporter.

(Whereupon, at 2:53 o'clock P. M. the reporter was excused.)

Adjourned to Monday, October 7, 1935, at 10:30 o'clock A. M.

[fol. 63] New York, October 7, 1935, 10:30 A. M.

(Note:—Counsel were not present.)

The Court: Gentlemen of the jury, there will not be any session of court today. After you had left on Friday, both sides moved for the direction of a verdict, and that takes the case out of the hands of the jury; so the case has been put over until tomorrow morning, Tuesday, at half-past ten; and you are excused.

Adjourned to Tuesday, October 8, 1935, at 10:30 o'clock A. M.

New York, October 8, 1935, 10:30 A. M.

ORDER GRANTING DEFENDANTS' MOTION FOR DIRECTED VERDICT

The Court: I have read most of these authorities which were submitted when we were here last week, and I am inclined to follow Judge Dore's decision. I shall, therefore, hold in this case, first, that the Harriman Bank was not enriched by reason of the sale of the bank's stock to Mr. Oppenheimer.

Second, that neither Mr. Harriman nor Mr. Williamson had any actual or apparent authority to make the representations to Mr. Oppenheimer in connection with the sale of the bank stock; and I think, therefore, that there can be no recovery in the present action, and I will grant the motion of the defendants to direct a verdict in their favor, with costs.

[fol. 64] The Clerk: Gentlemen of the jury, the Court directs you to return a verdict in favor of the defendants, and so say you all.

The Foreman of the Jury: Yes.

Mr. Levy: May the plaintiff have an exception to your Honor's ruling?

The Court: Yes.

MOTION TO SET ASIDE VERDICT

Mr. Levy: And may I make a motion to set aside the verdict on the ground that it is against the law and against the weight of evidence?

The Court: I will deny the motion, and give you an exception; and, of course, you will have the customary time.

Mr. Levy: Just one other motion, to complete the record: I omitted the other day at the conclusion of the case to move to strike out all the testimony with regard to the affiliate. I objected to its admission, and I move to strike it out.

The Court: With respect to what?

Mr. Levy: The transactions between the bank and the affiliate, on the grounds urged when it was introduced.

The Court: I will deny the motion, and give you an exception.

Mr. Levy: Yes.

[fol. 65] PLAINTIFF'S EXHIBIT 1

The Harriman National Bank & Trust Company

New York

Office of the President

October 28, 1930.

Mr. Henry E. Oppenheimer, Henry E. Oppenheimer & Co.,
580 Fifth Avenue, New York City.

DEAR MR. OPPENHEIMER:

I am asking our Mr. F. S. Williamson to visit you and bring to your attention a matter that, I am sure, will prove of mutual interest.

You are one of our oldest and most valued depositors; and while, in former conclusions of a plan such as is now in mind, our first-grade depositors were not considered, but was confined to stockholders, we have, in this instance, included them. I believe, although the proposed allotment is relatively small, the way will be paved in bringing about a profitable and cooperative result, and in a manner that will be mutually beneficial and profitable.

May I ask that, as this contemplated plan includes but a few of our depositors, it be treated in strict confidence?

Very truly yours (Sgd.) J. W. Harriman.

JWH:KVQ.

[fol. 66] PLAINTIFF'S EXHIBIT 2

Harriman National Bank & Trust Company,

Bond Department

527 Fifth Avenue

New York

Sold to Henry E. Oppenheimer

Confirmation
No. C 1800

10/31/30

Shares	Par value of Bonds	Description	Price	Amount	Commission	Interest or dividend	Total
10		Harriman Natl. Bk. & Tr. Co.	1512	15,120.00			15,120.00

KINDLY REMIT BY CHECK

Make checks payable to Harriman National Bank & Trust Company—Bond Department. If remittance is not made on date to which interest is figured, please add the additional Accrued interest which amounts to — per day, to date of payment.

[Stamped on Face:] Paid Nov. 1, 1930. Harriman Nat. Bk. & Tr. Co., Bond Department. Please Receipt and Return.

[fol. 67] PLAINTIFF'S EXHIBIT 3

No. 1245

New York Nov. 3rd 1930.

Henry E. Oppenheimer & Co.

580 Fifth Avenue

Bond Dept.

Pay to the order of Harriman National Bank & Trust Co. $15,120.00/100

Fifteen Thousand One Hundred Twenty Dollars . . Dollars

To The Harriman National Bank and Trust Company, of the City of New York. 1-235.

Henry E. Oppenheimer & Co.

[Perforation:] PAID 11 • 3 30 H N B

[fol. 68] PLAINTIFF'S EXHIBIT 4

The Harriman National Bank & Trust Company

Fifth Avenue and 44th Street

New York

Cable: Harribank. Open 8 A. M. to 8 P. M.

November 3rd, 1930.

Mr. Henry E. Oppenheimer, 580—5th Avenue, New York City.

DEAR SIR:

We acknowledge herewith receipt of your check in the amount of $15,120.00 covering the purchase of 10 shares Harriman National Bank & Trust Company capital stock, at 1512.

Assuring you of our desire to be of service to you at all times, we are

Yours very truly, (Sgd.) A. M. Austin, Vice-President.

[fol. 69] PLAINTIFF'S EXHIBIT 5

The Harriman National Bank & Trust Company
Fifth Avenue and 44th Street
New York

Cable: Harribank. Open 8 A. M. to 8 P. M.

Nov. 7th, 1930.

Mr. Henry E. Oppenheimer, 580—5th Ave., New York City.

DEAR SIR:

We are forwarding to you under separate cover by registered mail 10 shares Harriman National Bank & Trust Company capital stock certificate #4632 registered in your name.

Kindly acknowledge receipt on the copy of our letter enclosed with the security.

Yours very truly, (Sgd.) A. M. Austin, Vice President.

[fol. 70] PLAINTIFF'S EXHIBIT 6

(This is a stock certificate, #7555, for 8 shares of the capital stock of The Harriman National Bank & Trust Company of the City of New York, in the name of Henry E. Oppenheimer. The par value of a share is stated to be $100; capital stock $2,000,000. The certificate is dated October 20, 1932.

On the back of the certificate appears the following:)

"The registered holder of the share or shares of stock represented by the within certificate is entitled to a beneficial interest in an equivalent amount of shares represented by said certificate, in the capital stock (of no par value), of the Harriman Securities Corporation, a New York Corporation, under the terms of a certain agreement dated April 16, 1925, made between Joseph W. Harriman, John A. Noble and Bertram L. Kraus, Trustees, parties of the first part, and Howard W. Charles, Julius Lichtenstein and Abram L. Leeds, and other subscribers, as shareholders of The Harriman National Bank & Trust Company, parties of the second part, subject to all the agreements, terms and

conditions contained in the said agreement, which is hereby made a part of this endorsement, with the same force and effect as if it had been set forth in full, and which agreement is on file in the office of the Trustees, c/o The Harriman National Bank & Trust Company, 527 Fifth Avenue, New York City.

Joseph W. Harriman, John A. Noble, Bertram L. Kraus, Trustees.

[fol. 71] For Value Received — hereby sell, assign and transfer unto —— ——, — Shares of the Capital Stock of The Harriman National Bank & Trust Company of the City of New York and the beneficial interest in the Harriman Securities Corporation coupled therewith, and do hereby irrevocably constitute and appoint —— ——, Attorney to transfer such shares of stock and beneficial interest on the books of the Transfer Agent and Trustees, with full power of substitution in the premises.

Dated —— —, 19—.

—— ——.

In Presence of —— ——."

[On Side:] "Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement or any change whatever."

[fol. 72] PLAINTIFF'S EXHIBIT 7

May 6, 1933.

Harriman National Bank and Trust Company, 557 Fifth Avenue, New York City.

Henry E. Cooper, Esq., Conservator, Harriman National Bank and Trust Company, 557 Fifth Avenue, New York City.

The Controller of the Currency, Washington, D. C.

GENTLEMEN:

On or about November 1, 1930, I was induced by fraud and false representations to purchase from the Harriman National Bank and Trust Company ten shares of its capital stock, and gave my check, and my deposit account in the said bank was debited therefor, in the sum of $15,120.00. I

received stock certificate #4632 for ten shares registered in my name. Before I became aware of the true facts, I received dividends amounting to $525.00, and sold two of said shares for the sum of $2408.00, and received stock certificate #7555 for the remaining eight shares of said stock.

I herewith serve notice that said alleged purchase was induced by fraud and false representations and that I rescind the same. I tender herewith said stock certificate #7555 for eight shares of Harriman National Bank & Trust [fol. 73] Company capital stock and I demand immediate payment of the sum of $12,187.00 with interest from November 1, 1930. If you are not in a position to make immediate payment of said sum because of the present status of the bank, then I demand that my deposit account be credited with the said sum of $12,187.00 with interest from November 1, 1930, and that you deliver to me a written statement to that effect.

Yours very truly, —— ——.

[fol. 74] PLAINTIFF'S EXHIBIT 8 WITH EXHIBITS ANNEXED THERETO

(Same Title)

It is hereby stipulated and agreed, by and between the attorneys for the plaintiff and the attorneys for the defendant The Harriman National Bank & Trust Company of the City of New York, subject only to objections as to materiality and relevance, and for the purpose of this trial only, as follows:

1. Margaret Singleton, who testified in the case of Margaret Singleton v. Joseph W. Harriman and the Harriman National Bank & Trust Company of the City of New York, and whose testimony is printed in the record on appeal in that case at folios 221-278, 548-551, 690-696, and Plaintiff's Exhibits 1, 2, 3A, 3B, 4 and 5, would, if called as a witness on the trial of this action, give the same testimony as she gave in that action.

(A digest of Singleton's testimony follows:)

Margaret Singleton of 305 West End Avenue, New York City, would testify that during the month of November, 1930, she was a depositor with The Harriman National

Bank and Trust Company of the City of New York, having a deposit account therein subject to check. On November 24, 1930, she had a conversation with Francis S. Williamson, a Vice-President of the Bank, at his request. Williamson presented her with a letter addressed to her dated November 22, 1930, being Plaintiff's Exhibit 8-A. At this [fol. 75] interview, Williamson said that the Bank stock was quoted at 1500 bid; that the Bank "had some of its shares that it wished to offer to its depositors" which it had acquired from an estate. Mrs. Singleton purchased two shares at $1512 each, and received confirmation slip being, Plaintiff's Exhibit 8-B. Her account with the Bank was debited to the extent of the purchase price, Plaintiff's Exhibits 8-C and 8-D. She received a letter dated November 25, 1930, being plaintiff's Exhibit 8-E.

PLAINTIFF'S EXHIBIT 8-A

(This is similar to Plaintiff's Exhibit 1, except for date, name and address of addressee.)

PLAINTIFF'S EXHIBIT 8-B

(This is similar to Plaintiff's Exhibit 2, except that in place of "Kindly Remit by Check", there appears "CHG. A/C". The stamps "Paid", etc., and "Please Receipt", etc., do not appear.)

[fol. 76] PLAINTIFF'S EXHIBIT 8-C

Harriman National Bank & Trust Company

Bond Department, New York

No. C 1911.

Debit
Depositor's Account

Margaret Singleton

Hotel Esplanade, 305 West End Ave., N. Y. C.

11/24/30.

N. B.—Duplicate in envelope with Monthly Bk. Statement of Nov. 1930.

	Price	Amount	Total
2 Shares Harriman Natl. Bk. & Tr. Co.	1512	3,024.00	3,024.00

CHG. A/C

Purchase of Securities.

[Perforated:] Paid 11 25 30 H N B

[fol. 77] PLAINTIFF'S EXHIBIT 8-D

The Harriman National Bank & Trust Co. of the City of New York

In Account with Mrs. Margaret Singleton, Hotel Esplanade, 305 West End Ave., New York, N. Y.

Statement for Month of November 1930

This Account as Rendered Will be Considered Correct Unless We Are Notified of Error, Within Ten Days.

Date	Debits	Date	Debits	Date	Debits	Date	Credits
1 6	60.00—				Balance	Nov. 1	6,224.67
2 12	60.00—					1	150.00
3 12	175.00—					3	537.50
4 19	100.00—					15	150.00
5 25	3,024.00—	Har.	Bk. Stk.				12
						Balance	3,643.17

[fol. 78] PLAINTIFF'S EXHIBIT 8-E

The Harriman National Bank & Trust Company

New York

Office of the President

DEAR MRS. SINGLETON: November 25, 1930.

I feel greatly complimented upon your prompt acceptance of my invitation, presented to you by Mr. Williamson. I feel certain that you will not regret the investment and only wish I could have offered you more, but that is quite impossible.

I want you to, at my request, put this certificate in the bottom of your box and forget it. I am sure you will find the results gratifying.

Very sincerely, J. W. Harriman.

Mrs. Margaret Singleton, Hotel Esplanade, 305 West End Avenue, New York City.

2. Reuben P. Sleicher of 45 West 45th Street, Manhattan, New York City, being sworn as a witness for plaintiff on this trial, would testify that during the month of November, 1930, he was a depositor with The Harriman National Bank & Trust Company of the City of New York, having a deposit account subject to check. On November 22, 1930, Francis S. Williamson, a Vice-president of the Bank, called [fol. 79] on him with a letter addressed to him, dated November 22, 1930, signed "J. W. Harriman," as follows:

"The Harriman National Bank & Trust Company

New York

Office of the President

November 22, 1930.

Mr. Reuben P. Sleicher, % Martin & Murray, 45 West 45th Street, New York, N. Y.

DEAR MR. SLEICHER:

I am asking our Mr. F. S. Williamson to visit you and bring to your attention a matter that, I am sure, will prove of mutual interest.

You are one of our most valued depositors; and while, in former conclusions of a plan such as is now in mind, our first grade depositors were not considered, but was confined to stockholders, we have, in this instance, included them. I believe, although the proposed allotment is relatively small, the way will be paved in bringing about a profitable and cooperative result, and in a manner that will be mutually beneficial and profitable.

May I ask that, as this contemplated plan includes but a few of our depositors, it be treated in strict confidence?

Very truly yours, J. W. Harriman (Signed)"

JWH:HL

[fol. 80] He bought one share of the Bank stock on November 26, 1930 at $151 2., which was charged to his account. On December 8, 1930, he received a letter addressed to him signed "J. W. Harriman," as follows:

"The Harriman National Bank & Trust Company

New York

Office of the President

December 8, 1930.

Dear Mr. Sleicher:

I feel greatly complimented upon your prompt acceptance of my invitation, presented to you by Mr. Williamson. I feel certain that you will not regret the investment, and only wish I could have offered you more, but that it quite impossible.

I want you to, at my request, put this certificate in the bottom of your box and forget it. I am sure the results will be gratifying.

Very truly yours, J. W. Harriman (Signed)

Mr. Reuben P. Sleicher, % Martin & Murray, 45 West 45th Street, New York City."

3. Elmer P. Merkle of 76 Carlyle Avenue, Yonkers, New York, who testified in the Singleton case and whose testimony is printed in the record on appeal in that case at [fol. 81] folios 409-422, and Plaintiff's Exhibit 13, would if called as a witness in the trial of this action, give the same testimony as he gave in that action.

(A digest of Merkle's testimony follows):

Elmer P. Merkle would testify that during the month of October, 1930, he was a member of the firm of Merkle & Elberth, architects, depositors with The Harriman National Bank and Trust Company of the City of New York, having a deposit account therein subject to check. On October 22, 1930, Francis S. Williamson, a Vice-President of the Bank, called upon him with a letter addressed to him dated October 22, 1930, being Plaintiff's Exhibit 8-F. At this interview, Williamson said the Bank was "liquidating an estate of 20 shares of [Bank] stock," which he was quoting to

him at $1512. per share. Merkle bought five shares of Bank stock at $1512 each, paying for the same with his check drawn to the order of The Harriman National Bank and Trust Company of the City of New York. He received confirmation slip, being Plaintiff's Exhibit 8-G.

[fol. 82] PLAINTIFF'S EXHIBIT 8-F

(This is similar to Plaintiff's Exhibit 1, except for date and name and address of addressee.)

PLAINTIFF'S EXHIBIT 8-G

(This is similar to Plaintiff's Exhibit 2, except that the stamps "Paid," etc., and "Please Receipt," etc., do not appear.)

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4. William J. Elberth of 8907 34th Avenue, Jackson Heights, Long Island, who testified in the Singleton case, and whose testimony is printed in the record on appeal in that case at folios 423-427 and Plaintiff's Exhibits 14, 15 and 16, would, if called as a witness in the trial of this action, give the same testimony as he gave in that action.

(A digest of Elberth's testimony follows:)

William J. Elberth would testify that upon receiving a letter similar to that received by his partner Merkle, he purchased five shares of Bank stock at $1512 per share, paying for the same with his check drawn to the order of The Harriman National Bank and Trust Company of the City of New York. He received confirmation slip, being Plaintiff's Exhibit 8-H, and letter dated November 6, 1930, being Plaintiff's Exhibit 8-I.

PLAINTIFF'S EXHIBIT 8-H

(This is similar to Plaintiff's Exhibit 2. The following stamp appears thereon:

"Paid check #0516
Bank of Man. Trust Co.
W Y E 10/31/30.")

[fol. 83] PLAINTIFF'S EXHIBIT 8-I

(This is similar to Plaintiff's Exhibit 5, except for date and name and address of addressee.)

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5. Henry E. McDewell of 17 West 44th Street, Manhattan, New York City, being sworn as a witness for plaintiff on this trial, would testify that during the months of January and February, 1931, Hattie Soule McDewell and Henry E. McDewell were depositors with The Harriman National Bank & Trust Company having a joint deposit account subject to check. On February 2, 1931, Francis S. Williamson, a vice-president of The Harriman National Bank & Trust Company, called at his office with a letter addressed to him, dated January 30, 1931, signed "J. W. Harriman", as follows:

"The Harriman National Bank & Trust Company, New York

Office of the President

January 30, 1931.

Mr. Henry E. McDewell, 17 West 44th Street, New York, N. Y.

DEAR MR. MCDEWELL:

I am asking our Mr. F. S. Williamson to call upon you regarding a matter that may prove to be of interest to you inasmuch as you are a good depositor in this institution.

Commending Mr. Williamson to your consideration, I remain

Very truly yours, J. W. Harriman (Signed)."

JWH:ML.

[fol. 84] Both Hattie Soule McDewell and Henry E. McDewell were present at the interview with Francis S. Williamson which then occurred. Mr. Williamson said that an option on five shares of the Harriman National Bank & Trust Company stock was being offered to five or six depositors in the Bank and that Mr. McDewell was allotted one share at $1515., and that the market price of the stock was $1550. bid; Mr. McDewell bought one share at $1515. and received a confirmation of sale, Plaintiff's Exhibit 8-J.

Mrs. Hattie Soule McDewell bought two shares at the same time and received a confirmation of sale annexed hereto, Plaintiff's Exhibit 8-K. The purchase price was charged to their joint account and they received charge slips, Plaintiff's Exhibits 8-L and 8-M.

PLAINTIFF'S EXHIBIT 8-J

(This is similar to Plaintiff's Exhibit 2, except that there appears:

"CHG. A/C—Hattie
Soule & Henry E.
McDewell Joint A/C")

PLAINTIFF'S EXHIBIT 8-K

(This is similar to Plaintiff's Exhibit 8-J.)

[fol. 85] PLAINTIFF'S EXHIBIT 8-L

(This is similar to Plaintiff's Exhibit 8-C.)

PLAINTIFF'S EXHIBIT 8-M

(This is similar to Plaintiff's Exhibit 8-C.)

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6. William H. Boon of El Reno, Oklahoma, being sworn as a witness for plaintiff on this trial would testify that in May, 1931, he received a letter addressed to him dated May 18, 1931, signed "J. W. Harriman", as follows:

"The Harriman National Bank & Trust Company, New York

Office of the President

May 18, 1931.

Personal

Mr. W. H. Boon, Secretary, Canadian Hill & Elevator Co., El Reno, Oklahoma.

DEAR MR. BOON:

Your interest in the weekly advertising reprints of The Harriman National Bank and Trust Company leads me to

believe that you are acquainted with the business and banking policy of this institution. We have recently acquired a few shares of our stock from an estate, and it occurs to me to offer you an opportunity to purchase one share—[fol. 86] all I can offer at the present time. My idea is, of course, to extend the influence and associations of the Bank.

This stock cost $1515 per share and you may have one share at the same price, although the market is, and has been for some time past $1500 bid—$1600 asked. Each share of the Bank stock carries with it one share of the Harriman Securities Company stock. Combined dividends for a number of years have been $35. a share.

Three years ago we increased our capital, stockholders receiving the right to subscribe for one share for every two held at $310 a share. We continued to pay the same dividends on the increased capitalization; that is $35. per share. Last year we again increased our capital, distributing a stock dividend of one share for every three held, as a bonus. On this increased capitalization, we have likewise continued to pay the same dividend—$35. a share per year. You can readily see that we have always treated our stockholders very handsomely. The average annual return on an investment made in our stock, including stock dividends and market appreciation, since 1920, has been 50%. There is, by the way, one item in particular—the Banking House at Fifth Avenue and 44th Street—that has significant interest for shareholders.

I do not want you to consider this offer unless you are inclined to make a seasoned investment, for it is for investment we desire to have our stock held, not purchased for the mere purpose of selling on any material rise.

This stock is closely owned, and I desire it to be continued so. Should you take advantage of this offer, I hope you will place this Certificate in the bottom of your box [fol. 87] and forget it. I feel sure that the results will be gratifying.

I would appreciate hearing from you at an early date, as the stock now carries the full semi-annual dividend payable in July.

Yours very truly, J. W. Harriman.

JWH:KVQ.
Enclosure.

He purchased one share of the stock of The Harriman National Bank & Trust Company on or about June 16, 1931 and paid for it with check, Plaintiff's Exhibit 8-N.

[fol. 88] PLAINTIFF'S EXHIBIT 8-N

(This is a check of Canadian Mill & Elevator Co., El Reno, Oklahoma, signed by said company by W. H. Boon and John E. Gallagher, drawn on the Chase National Bank of New York to the order of W. H. Boon. On the back of the check appears the following:

"Pay to the order of: The Harriman National Bank & Trust Company.

[Signed] W. H. Boon."

On the back also appears a stamp: "Received payment through New York Clearing House prior endorsements guaranteed. Jun. 20, 1931. The Harriman National Bank and Trust Co. of the City of New York.")

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7. Norman F. D'Evelyn of 405 Montgomery Street, San Francisco, California, being sworn as a witness for plaintiff on this trial, would testify that in June 1931, he received a letter addressed to him dated June 9, 1931, as follows:

[fol. 89] "The Harriman National Bank & Trust Company, New York

June 9, 1931.

Office of the President

Personal

Norman P. D'Evelyn, Esq., Balfour Building, San Francisco, California.

DEAR MR. D'EVELYN:

Your interest in the weekly advertising reprints of the Harriman National Bank and Trust Company leads me to believe that you are acquainted with the business and banking policy of this institution. We have recently acquired a few shares of our stock from an estate, and it occurs to me to offer you an opportunity to purchase one share—all

I can offer at the present time. My idea is, of course, to extend the influence and associations of the Bank.

This stock cost $1515 per share and you may have one share at the same price, although the market is, and for some time past has been, $1500 bid—$1600 asked. Each share of the Bank stock carries with it one share of the Harriman Securities Company stock. Combined dividends for a number of years have been $35. a share.

Three years ago we increased our capital, stockholders receiving the right to subscribe for one share for every two held at $310 a share. We continued to pay the same divi- [fol. 90] dends on the increased capitalization; that is, $35 per share. Last year we again increased our capital; distributing a stock dividend of one share for every three held, as a bonus. On this increased capitalization we have likewise continued to pay the same dividend—$35 a share per year. You can readily see that we have always treated our stockholders very handsomely. The average annual return on an investment made in our stock including stock dividends and market appreciation since 1920 has been 50%. There is, by the way, one item in particular—the Banking House at Fifth Avenue and 44th Street—that has significant interest for shareholders.

I do not want you to consider this offer unless you are inclined to make a seasoned investment, for it is for investment we desire to have our stock held, not purchased for the mere purpose of selling on any material rise.

This stock is closely owned, and I desire it to be continued so. Should you take advantage of this offer, I hope you will place this Certificate in the bottom of your box and forget it. I feel sure that the results will be gratifying.

I would appreciate hearing from you at an early date as the stock now carries the full semi-annual dividend payable in July.

Yours very truly, J. W. Harriman, (Signed)".

JWH:ML
Encl.

Mr. D'Evelyn bought one share of the stock of The Harriman National Bank & Trust Company on or about July 11, 1931, and paid for it with check, Plaintiff's Exhibit 8-O.

[fol. 91] PLAINTIFF'S EXHIBIT 8-O

(This is check of Norman P. D'Evelyn, drawn on the Bank of California to the order of The Harriman National Bank & Trust Company.

On the back appears the following stamp: "Pay Any Bank, Banker or Trust Co. Prior endorsements guaranteed. Jul. 16, 1931. The Harriman Nat'l Bank & Trust Co. of the City of New York. J. L. Turner, Cashier.")

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8. Louis A. Jaskow of 8 Antler Place, New Rochelle, who testified in the case of Louis A. Jaskow v. The Harriman National Bank and Trust Company of the City of New York, and whose testimony in that case appears at pages 2-27 of the stenographer's minutes, would, if called as a witness in the trial of this action, give the same testimony as he gave in that action.

(A digest of Jaskow's testimony follows:)

Louis A. Jaskow would testify that during the months of June and July, 1931, he was a depositor with The Harriman National Bank and Trust Company of the City of New York, having a deposit account therein subject to check. In June, 1930, he received by mail a letter substantially identical with Plaintiff's Exhibit 1. Thereafter he called at the Bank and had a conversation with one Noble, a Vice-[fol. 92] President. Noble said the Bank stock was quoted at 1500 bid and 1600 asked. Thereupon Jaskow bought 2 shares of the Bank stock at $1515 each, the purchase price being charged to his account July 2, 1931. He received a confirmation slip similar to Plaintiff's Exhibit 2.

9. Marinus Roefs of 18607 Jordan Avenue, St. Albans, Long Island, who testified in the Singleton and Jaskow cases, and whose testimony is printed in the record on appeal in the Singleton case at folios 364-373 and appears in the Jaskow case at pages 41-52 of the stenographer's minutes, would, if called as a witness on the trial of this action, give the same testimony as he gave in those actions.

(A digest of Roefs' testimony follows:)

Marinus Roefs would testify that during the years 1930, 1931 and 1932 he was a trader with Clinton, Gilbert (or

Clinton Gilbert & Company, successor), dealers and specialists in bank stocks. He had charge of furnishing quotations to the Bank Stock Dealers Association and the Unlisted Security Dealers Association. During the period November 1930, to March 1932, the final bid for Harriman Bank stock which he furnished daily to the said Associations usually came from the Harriman Bank through Austin, an officer of the Bank, at about 4 o'clock in the afternoon of the business day. Each such bid furnished the Associations represented a sale to the Bank and the quotation was the price at which the stock was sold to the Bank. There were very few sales to persons other than the Bank. On cross examination, Roefs would testify that [fol. 93] when he speaks of a sale to the Bank, he means that the dealings of Clinton, Gilbert were with the Bank solely; that confirmations for sales were sent to the Bank, attention of Mr. Austin; but he does not know whether the sale was to the Bank or through the Bank.

10. Frank J. O'Reilly of 19 Coles Avenue, Amityville, Long Island, being sworn as a witness for plaintiff on this trial, would testify that during 1929, 1930 and 1931, he was associated with Gilbert Elliott & Company, specialists in bank stocks. During this period, whenever the Harriman National Bank & Trust Company stock was offered for sale through Gilbert Elliott & Company, he would inquire of Mr. Austin, a vice-president of the said Bank, whether the Bank would make a bid for the stock. Except on very rare occasions no offer was made for such stock except by the Bank. The following sales of bank stocks were made by Gilbert Elliott & Company from January 1930 to November 1931:—647 shares of Harriman National Bank & Trust Company stock sold to the Bank in 139 trades; during the same period, 25 shares in 8 trades sold to parties other than the Bank. Gilbert Elliott & Company furnished quotations to the Unlisted Security Dealers Association during the period 1929 to 1931. The bids furnished such Association were generally based on bids made by Mr. Austin for the Bank.

The said Frank J. O'Reilly would testify on cross-examination that when he refers to bids or offers by, or sales to, the Bank, he does not know whether the bids, offers or sales were made by or to the Bank as principal or as agent for a customer.

[fol. 94] 11. Raymond Boylan of 499 West 129th Street, New York City, being sworn as a witness for plaintiff on this trial, would testify that during 1921 he was associated with Grannis Doty & Company or Doty Fay & Company (a successor company), dealers in bank stocks. During the period January 12, 1931 to July 3, 1931, Doty Fay & Company made the following sales of Harriman National Bank & Trust Company stock:—137 shares of Harriman National Bank & Trust Company stock sold; the purchaser of 132 of these shares being Harriman Bank.

During the period October 1, 1930 to January 12, 1931, Doty Fay & Company had the following transactions in Harriman National Bank & Trust Company stock:

[fol. 95]

Date		Shares	Bought from	Price	Date		Shares	Sold to	Price
	1930								
Oct.	1	4	Greenhall Co.	$1500	Oct.	1	4	Harriman Nat. Bank	$1515
	9	15	Kearn & Wm.	1485		9	15	" " "	1495
	24	10	A. Lewishon Co.	1475		24	5	" " "	1500
						25	5	" " "	1500
	27	1	Greenhall Co.	1490		27	1	Kearn	1500
		3	"	1490			3	Gilbert Eliott Co.	1500
		5	Sydeman Bros.	1490			5	" "	1500
Nov.	3	5	Greenhall Co.	1490	Nov.	3	5	Harriman Nat. Bank	1500
	10	10	Rudolph Bukner	1450		10	10	" " "	1490
	11	5	Hanson Hanson	1475		12	5	" " "	1490
	12	5	Noble & Corwin	1475		13	5	" " "	1490
		5	" "	1475			5	" " "	1485
		5	" "	1475			5	" " "	1500
	13	5	" "	1480			5	" " "	1490
	14	10	A. Lewishon Co.	1490		14	10	" " "	1500
	20	10	P. F. Bonnett	1500		20	10	" " "	1505
Dec.	15	8	Englander	1497½	Dec.	15	8	" " "	1500
	16	5	Palmer Co.	1505		16	5	Gilbert E. Co.	1510
	18	6	Harriman Nat. Bk (to trade of 12/17/30)	1510		17	6	Harriman Nat. Bank	1510
						18	6	" " "	1505
	19	26	U. S. Trust Co.	1480		19	5	" " "	1500
						20	5	" " "	1500
						22	5	" " "	1500
						24	5	" " "	1515
	1931					1931			
Jan.	12	4	Irving Tr.	1500	Jan.	12	4		

[fol. 96] The said Raymond Boylan would testify on cross-examination that when he refers to the Bank as purchaser, or when the records of Doty Fay & Company, as above set forth, refer to the Bank as purchaser, he does not know whether the Bank acted as principal or as agent for a customer.

12. That John E. Windhorst of 74 Trinity Place, New York City, who testified in the Jaskow case, and whose testimony appears in the stenographer's minutes in that case at pages 80-83, would if sworn as a witness on the trial of this action, give the same testimony as he gave in that case.

(A digest of Windhorst's testimony follows:)

John E. Windhorst would testify that during 1931 and 1932 he was a trader with Hoit, Rose & Troster, dealers in bank stocks. That from January 1, 1931, to July 2, 1931, Hoit, Rose & Troster had the following transactions in Harriman Bank stock: Bought and sold 83 shares in 41 deals. The purchaser in all of these deals was the Harriman Bank. The checks for the purchases were checks of the Harriman Bank and the memoranda of sale were to the Bank. Windhorst would testify on cross examination that he assumed the bank was acting as agent in these transactions.

13. James Aspell of 2 Gramercy Park, New York City, [fol. 97] who testified in the Jaskow case, and whose testimony appears in the stenographer's minutes in that case at pages 69-79, would if called as a witness in the trial of this action give the same testimony as he gave in that case.

(A digest of Aspell's testimony follows:)

James Aspell would testify that he is the treasurer of Aspell & Co., Inc., the successors of Greenhall & Company. That from January 1, 1931, to July 2, 1931, Greenhall & Company, dealers in unlisted securities including bank stocks, had the following transactions in Harriman National Bank & Trust Company stock:

[Feb. 98]

Date	Shares	Bought from	Price	Date	Shares	Sold to	Price
1931				1931			
Jan. 13	3	Harriman Bank	$1510	Jan. 13	3	Cora Goldstein	$1535
26	2	" "	1495	26	2	Edgar B. Lee	1560
Mar. 5	2	Edgar B. Lee	1500	Mar. 5	2	Harriman Bank	1500
Apr. 14	1	Irene R. Weisbein	1500	Apr. 14	3	" "	1500
	2	C. Greenfield	1500				
30	3	Pansy Ranch	1495	30	3	" "	1500
May 4	3	Cora Goldstein	1495	May 4	3	" "	1500
14	2	C. Albert Eckhart	1500	14	7	" "	1500
	5	Mrs. B. McKeever	1500				
21	1	E. S. Silverman	1490	21	1	" "	1500
26	2	James Aspell	1500	*26	2	" "	1500
28	1	Herman Robinson	1490	†28	1	" "	1500
June 2	2	James Aspell	1499.50	June ‡1	2	" "	1500
11	1	H. S. Canbee	1495	June 11	2	" "	1500
	1	M. S. Canbee	1495				
15	2	Buell McKeever	1500	June 15	2	" "	1500

* As of 27th.
† As of 29th.
‡ As of 2nd.

[fol. 99] On cross examination Aspell would testify that when the above table states "sold to" Harriman Bank, it does not appear whether Harriman Bank was acting as principal or agent.

13A. During the period October 1, 1930 to January 13, 1931, Greenhall & Company (predecessors of Aspell & Company) had the following transactions in Harriman National Bank & Trust Company stock:

[fol. 100]

Date 1930	Shares	Bought from	Price
Oct. 1st	10	Lillia B. Hyde	$1495
" 2nd	5	" "	1495
" 6th	10	" "	1492
" 10th	4	A. Ralph Steinberg	1475
" 15th	5	Sampson H. Schwarz	1475
" 16th	5	Cora Goldstein	1465
" 21st	5	James Aspell	1475
" 23rd	5	Sampson H. Schwarz	1460
" 27th	4	" "	1475
" 27th	5	George Ainsworth	1465
" 29th	5	Mrs. Irma Lindheim	1475
Nov. 3rd	10	Sampson H. Schwarz	1471
" 6th	4	Mathias Niewenhouse	1490
" 8th	2	Seligsberg & Co	1447
" 11th	5	National City Bank, 42nd St	1470
" 12th	1/3	Eglee Inv. Corp	1470
" 12th	6 2/3	William F. Zentler	1470
" 12th	1	Anna E. Gordon	1465
" 26th	1	Mrs. Theresa Breiter	1500
Dec. 1st	1	" " "	1500
" 13th	1	Pansy G. Rasch	1500
" 17th	1	Pansy G. Rasch	1500

Date 1930	Shares	Sold to	Price
Oct. 1st	6	Hoit Rose & Troster	$1500
" 1st	4	Grannis Doty & Co.	1500
" 2nd	5	Harriman Bank	1500
" 6th	10	" "	1496
" 10th	4	" "	1485
" 15th	5	" "	1485
" 16th	5	" "	1475
" 21st	5	" "	1480
" 23rd	5	" "	1470
" 27th	4	Grannis Doty & Co.	1490
" 27th	5	Harriman Bank	1475
" 29th	5	Harriman Bank	1490
Nov. 3rd	5	Harriman Bank	1485
" 3rd	5	Grannis Doty Co.	1490
" 6th	4	Harriman Bank	1500
" 8th	2	Harriman Bank	1500
" 11th	5	Hoit Rose & Troster	1480
" 12th	8	Harriman Bank	1480
" 26th	1	Palmer & Co.	1515
Dec. 1st	1	Harriman Bank	1505
" 13th	1	" "	1510
" 17th	1	" "	1510

[fol. 101] When the records of Greenhall & Company, as above set forth, refer to shares "sold to" the Bank, it does not appear whether the Bank acted in the transaction as principal or as agent for a customer.

14. Henry T. Gallaher of Amityville, Long Island, being sworn as a witness for plaintiff on such trial, would testify that in November and December 1930, he was associated with the firm of Gilbert Elliott & Company, dealers in bank stock, as partner in charge of bank stock trading; that during 1930, he furnished quotations of The Harriman National Bank & Trust Company stock to the Bank Stock Dealers Association, based on prevailing supply and demand as he saw it in his office; that from March 8th to September 23rd, 1932, his firm had the following dealings in Harriman National Bank & Trust Company stock:

"March 8th, purchase of one share from Grannis, McMurdy, at $1,345;

Same day, sold one share to Harriman National Bank at $1350;

March 9th, purchased one share from Grannis, McMurdy at $1335;

March 9th, sold one share to the Harriman National Bank, at $1340;

March 10th, purchased one share from Grannis, McMurdy, $1335;

Same date, sold one share to Harriman National Bank, at $1340;

April 21st, purchased one share from Robert Morris & Co., at $1315;

Same date, sold one share to Harriman National Bank, at $1320;

[fol. 102] April 22nd, purchased one share from Robert Morris & Co., at $1320;

Same date, sold one share to the Harriman National Bank, at $1320;

April 23rd, purchased one share from Robert Morris & Co., at $1315;

Same date, sold one share to the Harriman National Bank, at $1320;

April 25th, purchased one share from Robert Morris & Co., at $1315;

Same date, sold one share to Harriman National Bank, at $1320;

April 26th, purchased one share from Robert Morris & Co., at $1315;

Same date, sold one share to Harriman National Bank, at $1320;

April 27th, purchased one share from Robert Morris & Co., at $1315;

Same date, sold one share to Harriman National Bank, at $1320;

April 28th, purchased one share from Robert Morris & Co., at $1315;

Same date, sold one share to Harriman National Bank, at $1320;

April 29th, purchased one share from Robert Morris & Co., at $1315;

Same date, sold one share to Harriman National Bank, at $1320;

May 2nd, purchased one share from Robert Morris & Co., at $1315;

Same date, sold one share to Harriman National Bank, at $1320;

May 3rd, purchased one share from Robert Morris & Co., at $1315;

Same date, sold one share to Harriman National Bank, at $1320;

May 4th, purchased one share from Robert Morris & [fol. 103] Co., at $1295;

Same date, sold one share to Harriman National Bank, at $1300;

May 5th, purchased one share from Robert Morris & Co., at $1295;

Same date, sold one share to Harriman National Bank at $1300;

May 6th, purchased one share from Robert Morris & Co., at $1295;

Same date, sold one share to Harriman National Bank at $1300;

May 10th, purchased one share from Robert Morris & Co., at $1295;

Same date, sold one share to the Harriman National Bank, at $1300;

May 11th, purchased one share from Robert Morris & Co., at $1245;

Same date, sold one share to Harriman National Bank at $1250;

May 12th, purchased one share from Robert Morris & Co., at $1245;

Same date, sold one share to Harriman National Bank at $1250;

May 13th, purchased one share from Robert Morris & Co., at $1245;

Same date, sold one share to Harriman National Bank at $1250;

May 17th, purchased one share from Robert Morris & Co., at $1220;

Same date, sold one share to Harriman National Bank at $1225;

May 18th, purchased one share from Robert Morris & Co., at $1220;

Same date, sold one share to Harriman National Bank at $1225;

May 19th, purchased one share from Robert Morris & [fol. 104] Co., at $1185;

Sold one share to Harriman National Bank at $1190;

May 27th, sold one share to Benjamin D. Taetel for $300;

May 28th, bought one share of Hoit, Rose & Troster, at $265;

July 8th, bought five shares of Potter & Co., at 188½ per share;

Same date, sold five shares to Robert Morris, at $200 a share;

July 19th, bought five shares from Hoit, Rose & Troster, at $175 a share;

Same date, sold five shares to Robert Morris, at $185 a share;

July 25th, bought ten shares of Hoit, Rose & Troster, at $150 a share;

Same date, sold ten shares to Robert Morris & Co., at $160 a share;

July 28th, bought five shares from Joseph Egberg, at $140 a share;

Same date, sold five shares to Benjamin D. Traetel, at $150 a share;

September 9th, bought thirty shares of Hoit, Rose, at $107 a share;

Same date, sold thirty shares to Ash & Company, at $110 a share;

September 23rd, bought two shares of Hoit, Rose, at $90 a share;

September 23rd, sold two shares to Ash & Company, at $93."

January 16, 1933; Gilbert Elliott & Company bought five shares from Katz Bros. at $45 per share, and sold them on the same day to Ulrich & Company at $50 per share.
[fol. 105] The said Henry T. Gallaher would testify on cross examination that when he refers to sales to the Bank he does not know whether the bank was acting as principal or as agent for a customer.

15. Frank A. Schmitt of 1370 Merry Avenue, Bronx, New York City, being sworn as a witness for plaintiff on this trial, would testify that during the period beginning January 1, 1930 he has been Chief Financial Statistician for the New York Herald-Tribune. The Herald-Tribune published bid and asked prices for The Harriman National Bank & Trust Company stock under the heading "Over-the-Counter Security Market Quotations," receiving these bid and asked prices from the Unlisted Security Dealers Association of New York on lists headed "Association of Bank Stock Dealers" until about March, 1932. The paper discontinued publishing bid and asked prices of the Harriman National Bank & Trust Company stock in the latter part of May, 1932.

16. Joseph S. Donlon of Belleville, New Jersey, being sworn as a witness for plaintiff on this trial, would testify that during the period beginning January 1, 1930 he supervised the over-the-counter market quotations appearing in the New York Times. During this period the New York Times published quotations of The Harriman National Bank & Trust Company stock under the heading "Banks and Trust Companies," securing these quotations from the Unlisted Security Dealers Association and the Association of Bank Stock Dealers. On March 17, 1932, these associations stopped furnishing quotations. The New York Times, [fol. 106] however, continued to publish quotations until May 30, 1932.

17. Peter Ross of No. 721 Walton Avenue, Bronx, New York City, who testified in the Singleton case and whose testimony is printed in the record on appeal in that case, at folios 346-363, would, if called as a witness on the trial of this action, give the same testimony as he gave in that case.

(A digest of Ross' testimony follows:)

Peter Ross would testify that in November, 1930 he was chief manager of the quotation bureau of the bank stock department of the Unlisted Security Dealers' Association of New York (affiliated with the Association of Bank Stock Dealers). During this period he, or behalf of the Association, furnished quotations on bank stocks, including Harriman Bank stock, to newspapers, including the New York Times, Herald-Tribune, Wall Street Journal, Journal of Commerce, Evening Post, Evening Sun, Evening World, Associated Press and United Press. He secured the quotations which he furnished the newspapers from Clinton, Gilbert & Co., Hoyt, Rose & Troster and Gilbert Eliot & Co. The Association continued to furnish quotations to the papers until March 18, 1932.

18. Raymond W. Kelly of 3430—92nd Street, Jackson Heights, Long Island, New York, being sworn as a witness for the plaintiff on this trial, would testify that he never had any personal interest in any of the certificates for shares of the stock of The Harriman National Bank & Trust [fol. 107] Company standing in his name in November, 1930, and throughout 1930 and 1931.

That on cross examination he would testify that he held such shares of stock as nominee for the Harriman Securities Corporation; that he was employed during the whole period by the Harriman Investors Fund, Inc.; that when the certificates came in for transfer into his name he endorsed them and examined them, but did not examine the assignments or powers of attorney for transfer to him.

19. That plaintiff's Exhibit No. 6 in the Singleton case, is a true and correct copy of the stock transfer sheets of the Harriman National Bank & Trust Company for the month of November, 1930.

(The stock transfer sheets, which are omitted from printing, show the following under date November 6, 1930:

Closed a/c	Surrendered Name	Certificate No.	Shares	Issued Name	Certificate No.	Shares	New a/c
D982							
	Raymond Kelly	4599	3	—Henry E. Oppenheimer—	4632	10	
	Raymond Kelly	4527	5	—Ten—			
	Raymond Kelly	4528	5	—580 Fifth Avenue New York, N. Y.			
				1			
	Raymond Kelly	4587	25	—Edward R. West—	4633	10	
				—Ten— c/o E. R. West Coffee Co. 180 West Street New York, N. Y.			
				2			
				—Mrs. Benveneda Davis—	4634	5	
				—Five— c/o Richard Davis Co. 12 East 41st Street New York, N. Y.			
				3			
				—Arthur Falk—	4635	1	
				—One— 501 Fifth Avenue New York, N. Y.			)

[fol. 108] 20. That plaintiff's Exhibit No. 9 in the Singleton case (tables 1 and 2) [herein Exhibit 8-P], are true and correct summaries of the stock transfers from Raymond W. Kelly during November 1930, and transfers to Kelly during the same month. That the testimony appearing at folios 323-326, inclusive, of the Singleton record relating to whether the transferees from Kelly during the month of November 1930 were depositors in the Harriman National Bank & Trust Company is true and correct.

[fol. 109] PLAINTIFF'S EXHIBIT 8-P

Table No. 1

1930	Certificates in name of Raymond Kelly surrendered No.	Shares		Certificates issued in place thereof No.	Shares
Nov. 3	4583	29	Francis J. Knox	4620	1
	4542	10	George E. Sealy	4621	1
			B. Schwanda Sons	4622	1
		39	Ralph Modjeski	4623	1
			The Frank A. Munsey Co.	4624	5
			Joseph Schaeffer	4625	10
			Walter H. Merrall	4626	10
			Elmer P. Merkle	4627	5
			William J. Elberth	4628	5
					39

PLAINTIFF'S EXHIBIT 8-P—Continued

Table No. 1—Continued

1930	Certificates in name of Raymond Kelly surrendered No.	Shares		Certificates issued in place thereof No.	Shares
6	4599	3	Henry E. Oppenheimer	4632	10
	4527	5	Edward R. West	4633	10
	4528	5	Mrs. Benveneda Davis	4634	5
	4587	25	Arthur Falk	4635	1
			Maud Bowman	4636	1
		38	Max E. May	4637	1
			Aaron A. Potter	4638	2
			Iphigene Ochs Sulzberger	4639	1
			Theodore Biens	4640	1
			Minnie S. Galinger	4641	2
			Clayton E. Freeman	4642	2
			Julius Keller	4643	2
					38
[fol. 110]					
Nov. 6	4459	1	Francis J. & Mrs. Elna Carman	4644	1
			To Kelly	4645–6	
			Sampson H. Schwarts	4647	
			To Kelly	4648–9	
	4607	15	Courtland H. Young	4650	10
	4555	5	William S. Coe	4651	4
	4456	5	Fred Vogel	4652	3
	4585	5	Ruth Benson Blinn	4653	3
			Earle H. McHugh	4654	1
		30	Florence Benel	4655	1
			Alfred Van Dorn	4656	1
			Frank E. De Borde	4657	1
			James P. McKinney	4658	1
			Kora M. Lublin	4659	1
					26
			Bal. to Kelly	4660	4
Nov. 7	4609	4	Daniel Smilo Sons	4664	2
			Mary Walls Inc	4665	2
					4
[fol. 111]					
Nov. 8	4649	5	Mrs. Mary L. MacDonald	4671	1
	4618	3	Louis Kilmarx	4673	1
	4606	2	Helwig Schier	4674	1
	4608	10	Burton C. Meighan	4675	1
	4645	5	Riggs Distler & Co., Inc	4676	1
			Mrs. Elizabeth C. Crittenden	4677	3
		25	Mrs. Dazie E. Richards	4678	2
			Frederick T. Mueller	4679	10
			Edward F. Shipman	4680	1
Mrs. Hattie Carnegie			David G. Aronberg	4681	1
4529 1 share		1	William Fried	4682	1
		26			23
			Bal. to Kelly	4683	3
					26

PLAINTIFF'S EXHIBIT 8-P—Continued

Table No. 1—Continued

1930	Certificates in name of Raymond Kelly surrendered No.	Shares		Certificates issued in place thereof No.	Shares
Nov. 11	4648	5	Leon E. Moon	4686	1
			Daniel T. Groff	4687	1
			Thomas F. Gurry	4688	1
			Mrs. Helen M. De Kay	4689	1
			Mrs. Zoe Helen Groff	4690	1
					5
[fol. 112]					
	4670	1	Franklin Simon	4692	1
Nov. 13	4646	5	Mrs. Leona R. Hess	4708	1
			Smith, Sturgis & Moore, Inc.	4709	1
			Phil S. Abrams	4710	1
			Bernard Kapp	4711	2
					5
14	4683	3	Mrs. Nellie T. McClunn	4717	3
	4701	5	Federal Seating Corp.	4718	1
	4660	4	Rooney Corp.	4719	63
	4347	9			64
	4345	7	Bal. to Kelly	4720	1
	4415	10			65
	4414	10			
	4412	10			
	4669	10			
		65			
Nov. 17	4697	10	Marshall Clapp	4725	1
			Mrs. Nellie B. Newcomb	4726	1
			Nicholas Murray Butler	4727	6
			James A. Graham	4728	1
			Raymond Kelly	4729	1
					10
[fol. 113]					
18	4693	10	Joseph O. McShane	4746	1
			William R. Teller	4747	1
			Mrs. Rosa F. Huyler Cooke	4748	1
			Thomas A. Moore	4749	6
			Raymond Kelly	4750	1
					10
19	4694	10	Ralph Farrington	4763	7
	4698	2	C. James Davis	4764	3
	4712	5	Frederick H. Engelken	4765	1
			Carolyn R. Alstatt	4766	1
		17	Charles Weber	4767	3
			Raymond Kelly	4768	2
					17

PLAINTIFF'S EXHIBIT 8-P—Continued

Table No. 1—Continued

1930	Certificates in name of Raymond Kelly surrendered No.	Shares			Certificates issued in place thereof No.	Shares
	Raymond					
Nov. 20	Kelly	4695	10	Mrs. Margery Du Pont	4774	5
	"	4720	1	Edward C. Rushmore	4775	5
	"	4702	15	A. Eugene Kirby	4776	3
				Arthur S. Allen	4777	1
			26	John M. Grognet	4778	1
				Irene F. Barrymore	4779	1
				Ella De Peyster	4780	10
						26
21	"	4750	1	Richard W. Lehne	4782	20
	"	4715	19	Lucius M. Bush	4783	1
	"	4729	1			21
			21			
24	"	4761	5	Henry Green	4784	1
[fol. 114]						
				John F. Sanderson	4785	2
				Mrs. Greta Pomeroy Clark	4786	1
				Raymond Kelly, Part of	4787	1
						5
24	"	4751	10	Miss Esther Schulman	4791	1
	"	4754	3	Robert S. Maffitt	4792	1
				Saratoga Company	4793	1
			13	Hyman G. Enelow	4794	1
				Mrs. Helen L. Howard	4795	1
				Mrs. Beth E. Dearborn	4796	1
				Mrs. Margaret Kennedy	4797	1
				Lloyd H. V. Reynolds	4798	1
				Mrs. Charlotte Eddy Morgan	4799	3
				Charles F. Rockwell	4800	2
						13
Nov. 28	Kelly	4752	10	Ralph Farrington	4808	1
				Samuel C. Freefield	4809	1
				Reuben P. Sleicher	4810	1
				Mrs. Louise McCarthy	4811	1
				Charles W. Berner	4812	1
				Alfred Van Horn	4813	1
				Frank E. De Borde	4814	1
				Thomas G. Wylie	4815	1
				Mrs. Margaret Singleton	4816	2
						10
29	"	4781	5	Claude Allen	4820	1
				Henry St. John Hyde	4821	1
				William V. Lifsey	4822	1
				Raymond Kelly	4823	2

PLAINTIFF'S EXHIBIT 8-P—Continued

[fol. 115]

Table No. 2

Certificates Acquired by Kelly in Nov. 1930

Date	No. of certificates issued to Kelly	No. of shares	From whom transferred	No. of certif.	No. of shares
Nov. 6	4645	5	Samson H. Schwarz	3526	12
	4646	5	"		
			Bal. to Schwarz No.	4647	
	4648	5	Bernard W. Vogel	2936	5
	4649	5	Fleischer & Morgenstern	2785	5
8	4669	10	Mathias Niewenhous	3776	4
	4670	1	A. M. Kidder & Co.	3205	1
			Sampson H. Schwarz	4647	2
		11	"	3804	4
					11
	4683	3	Miss Hattie Carnegie	4529	
			Bal. from Kelly		
12	4693	10	Mrs. Lillian Cohen	4176	15
	4694	10	John B. Johnston	1425	15
	4695	10	William Vetter	4256	2
	4696	10	George K. Morrow	2867	5
				3741	5
	4697	10	Rudolph Buckner	3599	5
	4698	2	"	2732	5
		52			52
	4701	5	Mrs. Kathryn Wormley	2987	5
Nov. 13	4702	15	David A. Ansbacher	2704	25
			The other 10 were transferred to Grannis Doty & Co. 4703–4 5 shares each		
[fol. 116]					
	4712	5	John Zanft	3873	8
			The other 3 were transferred back to John Zanft 4713		
Nov. 14	4715	19	Paul J. Bonwit	3587	6
			"	4334	1
			Lee Deutsch	4601	5
			Mrs. Anna E. Gordon	4179	1
			Riley & Co.	3944	1
			"	3004	3
			William Zentler	2838	2
					19
17	4730	16	Wm. Zentler	173	2/3
			August J. Lehner	210	1/3
			Grannis Doty & Co.	4700	5
			"	4704	5
				4703	5
					16
			Abraham M. Burd	3277	5
Nov. 18	4751	10	Frederick Korf	2400	5
	4752	10	"	4013	1
	4753	10	"	2837	2

PLAINTIFF'S EXHIBIT 8-P—Continued

[fol. 117]

Table No. 2—Continued

Certificates Acquired by Kelly in Nov. 1930

Date	No. of certificates issued to Kelly	No. of shares	From whom transferred	No. of certif.	No. of shares
	4754	3	"	3720	2
			John B. Johnstone	4705	5
		33	"	3190	2
			"	4450	3
			David Willens	4714	8
					33
Nov. 19	4761	5	Rieser & Co.	4193	10
			Bal. to Rieser & Co. No. 4762 5 shares.		
20	4781	5	Hurley & Co.	4723	5
24	4787	16	Raymond E. Boylan	4755	5
			Rieser & Co.	4762	5
			Hurley & Co.	4736	5
			Bal. to Kelly		
	4801	10	Bicher & Co.	4731	10
	4802	1	Nathan Ratnoff	4181	1
26	4804	5	Juan Kunsler	4161	5
	4805	1	Mrs. Elisabeth Butterworth	4352	1
	4807	5	Rieser & Co.	4213	10
			Bal. 5 No. 4806 to Rieser & Co.		
29	4818	5	Hurley & Co.	4737	5
	4819	1	"	4741	1

All the transferees from Kelly listed above were depositors with The Harriman Bank during this period, or officers of corporations or members of partnerships that were depositors, with the exception of:

Bowman, Galinger, Benel, Van Horn, DeBorde, Mac Donald, Kilmark, Curry, DeKay, McCunn, Graham, Alstatt, Schulman, Maffitt, Saratoga Co., Lifsey.

21. That the bank shares represented by stock certificate numbers 4599, 4527, 4528 and 4587, standing in the name [fol. 118] of Raymond W. Kelly during the month of November 1930, and from which 10 shares were transferred to the plaintiff herein, were held by the following persons prior to their transfer to Kelly:

October 22, 1930, certificate #4072 for 15 shares in the name of James Aspell surrendered for certificates #4526 for 10 shares in the name of James Aspell and #4527 for 5 shares in the name of Raymond W. Kelly.

October 23, 1930, certificate #4491 for 5 shares in the name of McKenna & Company surrendered for Certificate #4528 for 5 shares in the name of Raymond W. Kelly.

October 29, 1930, certificates #4512, 4508 and 4513 for 5 shares each in the name of Walter J. Salmon, certificate #4106 for 5 shares in the name of Hurley & Company, and certificate #4165 for 5 shares in the name of George Aimsworth—all surrendered for certificate #4587 for 25 shares in the name of Raymond W. Kelly.

October 29, 1930, certificate #4127 for 4 shares in the name of Sampson H. Schwarz surrendered for certificate #4599 for 3 shares in the name of Raymond W. Kelly and certificate #4600 for 1 share in the name of Thomas McWaters.

22. The following table contains a correct statement of the quotations published in the New York Times on the several dates listed in the column headed "Date of Paper" [fol. 119] of the bid and asked prices for stock of The Harriman National Bank and Trust Company under the heading "Banks and Trust Companies", the quotations after each date being the quotations published that day for the preceding day, except as stated in the last column of said exhibit, and in such cases for the day stated in the last column.

(This is omitted from printing. See infra, p. 141, being Defendants' Exhibit AA.)

25. That plaintiff's Exhibits numbers 17 and 18 in the Singleton case are true and correct copies of the balance sheets of the Harriman National Bank & Trust Company of November 1st and November 24th, 1930.

[fol. 119]

Harriman National Bank and Trust Company
Morning of Nov. 1-1930

	Main Office	Liberty Street Office	Total
Capital	2,000,000 —		
Surplus	2,000,000 —		
Profit & Loss	300,950.94	21,600.06	
Reserve for Contingencies	186,886.80	2,500 —	
	4,487,837.74	24,100.06	4,511,937.80
Demand Deposits:			
Individual—A-Bry	4,516,724.97		
" —Bu-Der	3,626,004.49		
" —Des-Gl	3,230,911.69		
" —Go-Hy	2,999,196.74		
" —I-Lo	2,810,344.88		
" —Lu-Ni	3,189,780.50		
" —No-Ru	3,246,597.91		
" —Ry-Ta	3,299,421.00		
" —Te-Z	2,784,917.32		
" —Sundry Inactive A-Z	220,652.68		
Total Individual Deposits	29,924,554.18	5,636,480.47	

Harriman National Bank and Trust Company
Morning of Nov. 1–1930

[fol. 120]	Main Office	Liberty Street Office	Total
Due to Banks and Trust Companies A-Z	2,457,197.18		
Sundry Accounts			
Certificates of Deposit		25,000 —	
Cashier's Checks	153,753.82	30,240.36	
Dividend Checks	1,592.50		
Certified Checks — Chase National Bank	22,816.95		
Certified Checks—Outstanding	319,027.78	1,012,736.72	
Liberty Loan Settlement Account			
First National Bank, Seward, Alaska, in liquidation (Settlement Account)	778.43		
Due to Trust Department	155,974.54	69,928.96	
Due to Trust Department—Downtown Banking House			
Total Demand Deposits	33,035,695.38	6,774,386.51	39,810,081.89
Time Deposits:			
Certificates of Deposit	346,000 —		
Trustees Postal Savings System	369,717.74		
Thrift Department	746,510.53		
Total Time Deposits	1,462,228.27		1,462,228.27
Reserved for Fixed Expenses	36,821.51	3,054.30	
Reserved for Taxes	118,217.80		
Reserved for Interest on Balances	52,626.28	3,014.92	
Total Reserves	207,665.59	6,069.22	213,734.81
Other Liabilities:			
Unearned Discount	131,898.01	5,342.82	
Due to Foreign Department	20,379.60		
Due to Bond Department			
Bills Payable with Federal Reserve Bank	0		
Outstanding Circulation	299,995 —		
Main Office—Branch Office	4,319,761.89)		
Rediscounts with Federal Reserve Bank	700.00)		
Total Other Liabilities	4,772,734.50	5,342.82	4,778,077.32
Customers' Participation:			
Time Collateral Loan—Customers'			
Time Collateral Loan—Brokers'			
Demand Collateral Loan—Customers'			
Demand Collateral Loan—Brokers'	200,000 —		
Dealers Paper			
Total Customers Participations	200,000 —		200,000 —
Total Liabilities	44,166,161.48	6,809,898.61	50,976,060.09

Harriman National Bank and Trust Company
Morning of Nov. 1-1930

	Main Office	Liberty Street Office	Total
[fol. 121]			
Earnings:			
Discount Received	236,692.51	2,342.43	
Exchange	125.78		
Interest on Investments	81,231.26		
		700.00)	
Interest on Loans	156,325.60	37,975.45)	
Interest on Bank Balances	3,938.89		
Commissions	7,787.21	138.65	
Trust Department earnings	20,027.40		
Foreign Department earnings			
Bond Department earnings	5,000 —		
Teller's differences			
Service Charges on Loans		18,149.23	
Total Income	511,128.65	59,305.76	570,434.41
Total Credits	44,677,290.13	6,869,204.37	51,546,494.50
Cash	616,146.88	39,467.39	
Exchanges	801,950.38	1,984,479.56	
City Collections	290,239.38		
Out of Town Collections			
Inter-office Checks			
Cash Items	350.—	342.09	
Total	1,708,686.64		
Difference Over	250.77		
	1,708,435.87	2,024,289.04	3,732,724.91
Due from Banks:			
Federal Reserve Bank	4,162,637.13		
Chase National Bank	408,622.58		
National City Bank	358,032.72		
Bank of the United States	5,560.25		
Chatham Phenix Nat. Bank and Trust Co.	369,545.47		
Miscellaneous—A-Z	253,344.55		
Items with Fed. Res. Bk. in Process of Collect'n	1,049,360.38		
Total Due From Banks	6,607,103.08		6,607,103.08
[fol. 122]			
Unsecured Loans:			
Bills Purchased	1,418,175 —		
Bills Discounted	10,206,332.67	254,103.03	
Secured Loans:			
Time—Customers	1,462,496.73	2,700 —	
Time—Brokers			
Demand Loan Customers—Held at Downtown Banking House	385,000 —		
Demand—Customers	5,476,412.35	234,735.05	
Demand—Brokers	6,930,000 —		
Total Loans	25,878,416.75	491,538.08	26,369,954.83

Harriman National Bank and Trust Company
Morning of Nov. 1-1930

	Main Office	Liberty Street Office	Total
Investments in Securities:			
U. S. Government:			
Pledged to secure circulation	300,000 —		
Pledged to secure State and other deposits	653,225 —		
Pledged to secure bills payable	0		
Unpledged	2,302,027.36		
Total	3,255,252.36		3,255,252.36
Other Bonds and Stocks:			
Bonds pledged to secure Trust deposits	960,015 —		
Bonds pledged to secured Postal Savings Deposits	343,055 —		
Bonds unpledged	2,372,032.65		
Stocks	134,363 —		
Stock of Federal Reserve Bank	120,000 —		
Bonds & Mortgages	67,678.25		
Total	3,997,143.90		3,997,143.90
Other Resources:			
Banking House Equity	2,300,000 —		
Accrued Interest Receivable	93,766.10	407.37	
Accounts Receivable—Trust Department	4,791.11		
Redemption Fund with U. S. Treasurer (5% Fund)	15,000 —		
Due from Foreign Department			
Due from Bond Department	552,887.78		
International Magazine Co., Inc. Missing Cancelled Checks on Harriman N/B [fol. 123] Credited Back to Their A/C	394.23		
Main Office—Branch Office		700.00 4,319,761.89	
Exchanges for Clearing House	10,468.84		
Sundry Accounts	49,906.88		
Total Other Resources	3,027,214.94	4,320,869.26	7,348,084.20
Total Assets	44,473,566.90	6,836,696.38	51,310,263.28
Expenses:			
Interest Paid Federal Reserve Bank	1,054.79		
Exchange			
General	148,161.61	19,174.64	
Rent	25,633.32	13,333.35	
Trust Department	20,337.14		
Tellers' Differences	16.14		
Reserved for Interest Paid on Balances			
Service Charges on Loans	8,520.23		
Total Expenses	203,723.23	32,507.99	236,231.22
Total Debits	44,677,290.13	6,869,204.37	51,546,494.50
Trust Dept. Control A/C	24,800,027.58	5,502,986.50	30,303,014.08

Harriman National Bank and Trust Company

Morning of Nov. 24–1930

	Main Office	Liberty Street Office	Total
Capital	2,000,000 —		
Surplus	2,000,000 —		
Profit & Loss	301,075.94	21,600.06	
Reserve for Contingencies	179,485.80	2,500 —	
	4,480,561.74	24,100.06	4,504,661.80
Demand Deposits:			
Individual—A-Bry	4,263,522.28		
" —Bu-Der	3,217,312.77		
" —Des-Gl	3,381,557.26		
" —Go-Hy	2,766,333.66		
" —I-Lo	3,005,326.85		
" —Lu-Ni	3,201,792.91		
" —No-Ru	3,063,481.34		
" —Ry-Ta	3,154,952.47		
" —Te-Z	2,996,743.45		
" —Sundry Inactive A-Z	232,213.83		
Total Individual Deposits	29,283,236.82	4,040,078.03	
[fol. 124]			
Due to Banks and Trust Companies A-Z	2,769,988.40		
Sundry Accounts			
Certificates of Deposit			
Cashier's Checks	113,922.07	7,638.65	
Dividend Checks	1,592.50		
Certified Checks—Chase National Bank	22,816.95		
Certified Checks—Outstanding	166,302.50	35,716.76	
Liberty Loan Settlement Account			
First National Bank, Seward, Alaska, in liquidation (Settlement Account)	778.43		
Due to Trust Department	127,377.58	56,927.27	
Due to Trust Department—Downtown Banking House			
Total Demand Deposits	32,486,015.25	5,040,360.71	37,526,375.96
Time Deposits:			
Certificates of Deposit	344,500 —		
Trustees Postal Savings System	369,717.74		
Thrift Department	767,868.00		
Total Time Deposits	1,482,085.74		1,482,085.74
Reserved for Fixed Expenses	31,849.12	3,054.30	
Reserved for Taxes	118,217.80		
Reserved for Interest on Balances	49,764.31	2,880.17	
Total Reserves	199,831.23	5,934.47	205,765.70

Harriman National Bank and Trust Company
Morning of Nov. 24 1930

	Main Office	Liberty Street Office	Total
Other Liabilities:			
Unearned Discount	170,401.30	5,359.82	
Due to Foreign Department	16,404.71		
Due to Bond Department	.....		
Bills Payable with Federal Reserve Bank	—0—		
Outstanding Circulation	284,095 —		
Main Office—Branch Office	3,849,545.41		
Rediscounts with Federal Reserve Bank	.....		
Total Other Liabilities:	4,320,446.42	5,359.82	4,325,806.24
Customers' Participation:			
Time Collateral Loan—Customers'	.....		
Time Collateral Loan—Brokers'	.....		
Demand Collateral Loan—Customers'	100,000 —		
Demand Collateral Loan—Brokers'	100,000 —		
Dealers Paper	.....		
Total Customers Participations	200,000 —	.....	200,000 —
Total Liabilities	43,168,940.38	5,075,755.06	48,244,695.44

[fol. 125]

Earnings:			
Discount Received	236,692.51	2,342.43	
Exchange	.....		
Interest on Investments	83,495.80		
Interest on Loans	158,401.37	38,936.37	
Interest on Bank Balances	3,992.96		
Commissions	9,525.60	160.50	
Trust Department earnings	21,290 —		
Foreign Department earnings	.....		
Bond Department earnings	5,000 —		
Tellers' differences	.....		
Service Charges on Loans	.....	18,419.83	
Total Income	518,398.24	59,859.13	578,257.37
Total Credits	43,687,338.62	5,135,614.19	48,822,952.81
Cash	557,584.86	29,855.22	
Exchanges	621,824.14	94,939.96	
City Collections	304,471.00		
Out of Town Collections	73,492.58		
Inter-office Checks	.....		
Cash Items	2,010.74	1.10	
Total	1,559,383.32		
Difference Over	2.01		
	1,559,381.31	124,796.28	1,684,177.59

Harriman National Bank and Trust Company
Morning of Nov. 24–1930

	Main Office	Liberty Street Office	Total
Due from Banks:			
Federal Reserve Bank	4,136,006.97		
Chase National Bank	254,619.63		
National City Bank	158,032.72		
Bank of the United States	5,560.25		
Chatham Phenix Nat. Bank and Trust Co.	169,545.47		
Miscellaneous—A-Z	329,803.28		
Items with Fed. Res. Bk. in Process of Collect'n	994,966.24		
Total Due From Banks	6,048,534.56		6,048,534.56
[fol. 126] Unsecured Loans:			
Bills Purchased	1,732,437.51		
Bills Discounted	10,431,657.38	255,103.03	
Secured Loans:			
Time—Customers	1,465,736.75	502,700 —	
Time—Brokers			
Demand Loan Customers—Held at Downtown Banking House	275,000 —		
Demand—Customers	5,435,095.90	364,545.45	
Demand—Brokers	6,330,000 —		
Total Loans	25,669,927.54	1,122,348.48	26,792,276.03
Investments in Securities: U. S. Government:			
Pledged to secure circulation	300,000 —		
Pledged to secure State and other deposits	653,225 —		
Pledged to secure bills payable			
Unpledged	2,302,027.36		
Total	3,255,252.36		3,255,252.36
Other Bonds and Stocks:			
Bonds pledged to secure Trust deposits	960,015 —		
Bonds pledged to secure Postal Savings deposits	343,055 —		
Bonds unpledged	2,318,032.65		
Stocks	134,363 —		
Stock of Federal Reserve Bank	120,000 —		
Bonds & Mortgages	67,678.25		
Total	3,943,143.90		3,943,143.90
Other Resources:			
Banking House Equity	2,300,000 —		
Accrued Interest Receivable	41,563.56		
Accounts Receivable—Trust Department	4,816.11		
Redemption Fund with U. S. Treasurer (5% Fund)	15,000 —		
Due from Foreign Department			
Due from Bond Department	559,252.54		
International Magazine Co., Inc. Missing Cancelled Checks on Harriman N/B Credited Back to Their A/C	394.23		

Harriman National Bank and Trust Company
Morning of Nov. 24–1930

[fol. 127]	Main Office	Liberty Street Office	Total
Main Office—Branch Office	.....	3,849,536.58	
Exchanges for Clearing House	7,593.46		
Sundry Accounts	49,906.88		
Total Other Resources	2,978,526.78	3,849,536.58	6,828,063.36
Total Assets	43,454,766.45	5,096,681.34	48,551,447.79
Expenses:			
Interest Paid Federal Reserve Bank	1,054.79		
Exchange	117.44		
General	167,448.09	22,057.83	
Rent	32,041.65	16,875.02	
Trust Department	23,099.41		
Tellers' Differences	19.96		
Reserved for Interest Paid on Balances	.....		
Service Charges on Loans	8,790.83		
Total Expenses	232,572.17	38,932.85	271,505.02
Total Debits	43,687,338.62	5,135,614.19	48,822,952.81
Trust Dept. Control A/C	24,898,540.61	5,473,318.75	30,371,859.36

26. That plaintiff's Exhibit No. 19 in the Singleton case is a true and correct copy of a trust agreement between stockholders of the Harriman National Bank & Trust Company of the City of New York and Joseph W. Harriman, John A. Noble and Bertram L. Kraus, as a committee for such stockholders, providing for the organization of Harriman Securities Corporation, dated April 16, 1925.

[fol. 128] AGREEMENT BETWEEN STOCKHOLDERS OF THE HARRIMAN NATIONAL BANK OF THE CITY OF NEW YORK AND JOSEPH W. HARR-MAN, JOHN A. NOBLE AND BERTRAM L. KRAUS, AS A COMMITTEE OF SUCH STOCKHOLDERS, PROVIDING FOR THE ORGANIZATION OF HARRIMAN SECURITIES CORPORATION

April 16, 1925

Agreement made this 16th day of April, 1925, by and between Joseph W. Harriman, John A. Noble and Bertram L. Kraus, hereinafter called the "Trustees," parties of the first part, and Howard W. Charles, Julius Lichtenstein and Abram L. Leeds, and other subscribers hereto, who are shareholders of The Harriman National Bank of the City of

New York, hereinafter called the "Subscribers," parties of the second part, as follows:

[fol. 129] Whereas, the parties of the first part are officers or directors of The Harriman National Bank of the City of New York, hereinafter designated as the "Bank," and each and every — of the parties of the second part is a stockholders of the Bank; and

Whereas, the Bank being organized as a National Banking Corporation, is limited in its power to acquire and hold securities, stocks and other property, and finds that such limitation of power is prejudicial to the conduct of the legitimate business of the Bank, in that it serves as a curtailment of its earning capacity; and

Whereas, the parties hereto believe that such disability may be partially overcome and avoided by the organization and maintenance of a business corporation, to be organized under the Laws of the State of New York, hereinafter designated as the "Securities Company," for the purpose of purchasing, holding, selling and dealing in securities, and other investments and transactions that may be permitted under its articles of incorporation.

Now, therefore, in consideration of the premises and of the sum of One Dollar ($1), by each of the parties hereto paid to the other, the receipt whereof is hereby acknowledged, and of the mutual covenants and agreements herein contained, the parties hereto do agree as follows:

First. That a Corporation shall be organized under the Laws of the State of New York, with an authorized stock issue of ten thousand (10,000) shares of no par value, under the title of "Harriman Securities Company" or such other [fol. 130] name as may be available, and with such powers as the Trustees may deem advisable.

Second. Each shareholder of the Bank shall have the right to a beneficial-interest through the Trustees in the capital stock of the Securities Company, to the extent of the shares held by him in The Harriman National Bank of the City of New York, and registered in his name at the date of the closing of the transfer books for the special dividend hereinafter referred to, provided he shall exercise such right, by becoming a party to this agreement on or before the 18th day of May, 1925; after that date the Trustees may, in their discretion, and upon such terms, as to price or otherwise, as they may prescribe, permit the holders of

stock of the Bank in respect to which such right may not have been exercised, to acquired shares in the Securities Company equivalent to the number of shares held by him in the Bank.

Third. Each shareholder subscribing shall receive a beneficial interest in the shares of the Securities Company equivalent in number to those held by him in the Bank.

Fourth. In order to facilitate participation by the shareholder of the Bank in the option specified in the foregoing paragraph, the Trustees will recommend to the Board of Directors of the Bank that a special dividend of fifty per cent. (50%) upon the capital stock be declared and paid to its shareholders, to the end that no outlay shall be required of them in the purchase of the stock, but the subscribers agree that if such dividend is declared and paid, they will, respectively, forthwith apply the same to the payment of [fol. 131]the capital stock of the Securities Company, and to that end, they hereby assign, transfer and set over such dividend, as and when declared, to the Trustees, jointly, for the purpose of making such payment; and they hereby empower and direct the Bank to pay to the Trustees for their account, respectively, the amount of such dividend, which the Trustees shall forthwith apply to the payment of the capital stock of the Securities Company, to the beneficial-interest in which the subscribers, respectively, may become entitled hereunder.

Fifth. All of the capital stock of the Securities Company paid for on behalf of the subscribers as aforesaid, shall be issued to and held by the Trustees jointly, and their successors in interest, according to their respective interests but said beneficial-interests of the subscribers therein shall not be transferable separately, but only by the transfer of the shares of stock of the Bank held by them, respectively and every sale or transfer of stock of the Bank by a subscriber, or his successor, shall include the beneficial-interest of such subscriber, or his successor, and the capital stock of the Securities Company attaching to the shares of the Bank so sold or transferred.

Sixth. As soon as said special dividend is declared by the Bank and the Subscribers have been notified by the Trustees of the organization of the Securities Company, they shall at once present to the Trustees, at the office of the

Bank, No. 527 Fifth Avenue, New York City, the certificates of stock of the Bank held by them, respectively, for the purpose of having stamped thereon the endorsement, in substance as follows:

[fol. 132] "The registered holder of the share or shares of stock represented by the within certificate is entitled to a beneficial-interest in an equivalent amount of shares represented by said certificate, in the capital stock (of no par value), of the Harriman Securities Company, a New York corporation, under the terms of a certain agreement dated April 16th, 1925, made between Joseph W. Harriman, John A. Noble and Bertram L. Kraus, Trustees, parties of the first part, and Howard W. Charles, Julius Lichtenstein and Abram L. Leeds, and other subscribers, as shareholders of The Harriman National Bank, parties of the second part —subject to all the agreements, terms and conditions contained in the said agreement, which is hereby made a part of this endorsement, with the same force and effect as if it had been set forth in full, and which agreement is on file in the office of the Trustees, c/o The Harriman National Bank, 527 Fifth Avenue, New York City."

Joseph W. Harriman, John A. Noble, Bertram L. Kraus, Trustees, by —— ——, Agent.

Seventh. Each holder of a certificate of bank stock is entitled to share equally and ratably with all other holders of stock certificates of the Bank, similarly endorsed, according to their several interests in the dividends or profits, and in case of dissolution, in the distribution of the capital of the Harriman Securities Company; such ratable interest [fol. 133] to be sold or transferred ratably only, by the transfer upon the books of the Bank of one or more shares of stock in the Bank, represented by a Bank stock certificate bearing the above endorsement; and all of the interest in and to, or in respect of said Securities Company, or its capital stock, represented by a Bank stock certificate bearing said endorsement shall pass ratably with and only with the transfer of such shares of the Bank represented by such bank stock certificate, and upon the transfer thereof upon the books of the Bank, and an interest in the Securities Company attached to any share of the Bank, shall be alienable only in connection with such transfer of such Bank stock.

No holder of a Bank Stock Certificate, or any transferee

of any share thereby represented, shall be entitled, in lieu thereof, to demand or to receive from the Bank a new certificate, except with said endorsement thereon; and the transfer of any share of the Bank stock containing said endorsement shall be made by the holder thereof, only to a transferee accepting therefor a new certificate bearing said endorsement.

No right to vote in respect of any share of stock of the Securities Company passes to, or shall be exercised by the holder of such certificate, such voting right being reserved to and by the Trustees, or their successors.

Eighth. From and after the placing of such endorsement upon any Bank stock certificate, the registered holder thereof shall be invested with such rights in respect to the Securities Company, or of its capital stock, as are indicated in this agreement, or in such endorsement, only and shall [fol. 134] have no right to vote any stock of the Securities Company, which right to vote is and shall be reserved exclusively to and by the Trustees, and their successors.

Ninth. No person other than a director of the Bank shall be eligible for office of director of the Securities Company; and if, after election, any such director of the Securities Company, for any reason shall cease to be a director of the Bank he shall simultaneously, as a matter of course, cease to be a director of the Securities Company.

Tenth. The number of Trustees under the Trust herein created shall be three (3) in number, all of whom shall be directors of the Bank. If any Trustee shall cease to be a director of the Bank, or by reason of death, disability or resignation, shall cease to perform his duties as Trustee hereunder, then his office as Trustee shall become vacant, and the remaining Trustees shall forthwith elect or appoint a successor. The Trustees, and such other persons as they may designate, who shall be directors of the Bank, shall constitute the first Board of Directors of the Securities Company. Any Trustee may, at any time, resign, by delivering his resignation to the other Trustees in writing. No Trustee shall be liable for the act of any other Trustee, but shall be liable only for his own wilful misconduct.

The Trustees may act by a majority, either at a meeting, or by writing, with or without a meeting.

Eleventh. There shall be stamped upon the certificates of stock issued by the Securities Company to the Trustees the following endorsement:

[fol. 135] "The share or shares of stock represented by this certificate are held by the Trustees named, and their successors, in trust, for the benefit of the shareholders of The Harriman National Bank of the City of New York entitled to the beneficial interest therein, according to the terms of a certain agreement dated April 16th, 1925, made between Joseph W. Harriman, John A. Noble and Bertram L. Kraus, Trustees, parties of the first part, and Howard W. Charles, Julius Lichtenstein and Abram L. Leeds, and other subscribers, as shareholders of the Harriman National Bank, parties of the second part."

All dividends upon the capital stock of the Securities Company, and all distribution of capital thereon, shall be paid by the Trustees of those shareholders of the Bank whose certificates shall be stamped as aforesaid, according to their respective interests. Such payments may be made by the Trustee- to the said shareholders directly, or to the Bank for their account and the Bank, in such case, shall thereupon distribute such dividends among those entitled to receive the same, at the same time as dividends are distributed upon the shares of stock held by them in the Bank, in so far as such distribution, in that manner and at such times, may be practicable. Payment by the Trustees to the Bank shall relieve the Trustees from all further liability with respect thereto.

Twelfth. This agreement may at any time be amended, modified or terminated, with the written consent of the Trustees and of two-thirds in interest of those for whom the capital stock of the Securities Company is then held by the Trustees.

[fol. 136] Thirteenth. All compensation of the Trustees and the charges, costs and expenses connected with the organization of the Securities Company, shall be paid by the Securities Company, and it shall also hold harmless the Trustees from all personal liability hereunder, except for their own wilful misconduct.

Fourteenth. Upon the termination of this agreement, the shares of stock of the Securities Company shall be distrib-

uted ratably to and among the holders of record of stock certificates of said Bank then outstanding and endorsed as aforesaid, in proportion to their several holdings.

Fifteenth. The Trustees, from time to time, will exercise their best judgment in the selection of directors of the Securities Company, so that its affairs may be properly managed, and also in any matter which may come before them; but they shall incur no liability in this respect, except for their own negligence or wilful malfeasance.

Sixteenth. All copies of this agreement, executed by the persons entitled to do so, shall have the like effect as if the signatures were subscribed to the original and the stamping of the certificates of stock of the Bank held by subscribers, in the manner hereinabove specified, shall have the same force and effect, as if they had executed the agreement.

Seventeenth. This agreement shall not be binding until it shall have been signed by stockholders of record of at least three-quarters in amount of the capital stock of the Bank and so declared by the Trustees, who may, in their [fol. 137] discretion, require a larger amount of subscriptions before declaring this agreement operative and in effect.

In witness whereof, the parties of the first and second part have hereunto set their hands and seals, the day and year first above written.

(Signed) Joseph W. Harriman, John A. Noble and Bertram L. Kraus, "Trustees," Howard W. Charles, Julius Lichtenstein and Abram L. Leeds, and Witness:

Trustees:

Joseph W. Harriman. (L. S.) John A. Noble, (L. S.)
Bertram L. Kraus. (L. S.) Howard W. Charles. (L. S.)
Julius Lichtenstein (L. S.) Abram L. Leeds. (L. S.)
H W C. J. L. A L L.

[fol. 138] DEFENDANT'S EXHIBIT A

Harriman National Bank & Trust Company
Bond Department
527 Fifth Avenue, New York

No. A 2178.

Credit
Customer's Account
Bond Department

Bought of Henry E. Oppenheimer & Co.

1/22/32

Shares—

Par Value of Bonds—6M

Description—Equitable Gas Lt. Co. of N. Y. 5% due 3/1/32

Price—100

Amount—6,000.00 CR. A/C

Commission—

Tax—

Interest or Dividend—

Total—6,000.00

[fol. 139] DEFENDANT'S EXHIBIT AA

(This consists of certain portions of the stipulation, being Plaintiff's Exhibit 8 herein.)

18. • • •

That said Raymond W. Kelly, being sworn as a witness for the defendant, would testify that the months of July, 1930, January, 1931, and July, 1931, were the only times when dividends were declared on such a stock. The dividends were paid, in respect to the shares of stock which stood in his name, by checks of the Trust Department, which checks were marked in evidence in the Singleton

case as defendant's exhibits G1 to G4, respectively [herein Defendants' Exhibits AA-1 to 4]; that the check for the July, 1931 dividend, Exhibit G4 in the Singleton record, was endorsed by him and handed to Mr. Burke or Mr. Klein of the Harriman Securities Corporation and entered on the cash book of the Harriman Securities Corporation as dividend received on Harriman and National Bank and Trust Company stock, July 3, 1931, $4882.50; that he endorsed the check for the January, 1931 dividend, Exhibit G3 in the Singleton record, and gave it to either Mr. Burke or Mr. Klein, and it was entered in the cash book of the Harriman Securities Corporation as dividend received on Harriman National Bank stock, January 3, 1931, $3202.50; that the two checks for the July, 1930 dividend, Exhibits G1 and G2, in the Singleton record, were signed with his name but not endorsed by him, and entered in the cash book of the Harriman Securities Corporation as dividends received on Harriman National Bank stock, July 7, 1930, $2800; that he does not know in what account these last two checks were deposited. Exhibits G1 to G4 in the Singleton record may be read in evidence as they appear in such record.

[fol. 140] DEFENDANTS' EXHIBIT AA-1

New York, July 3rd, 1930. No. 357.

The Harriman National Bank & Trust Co., 1-126 of the City of New York

Fifth Avenue and Forty-Fourth Street

Pay Harriman Nat. Bk. & Tr. Co. $17 and 50 cts.

To the order of Mr. Raymond Kelly % Harriman National Bank & Tr. Co., 527 Fifth Avenue, New York City, New York.

A. M. Austin, Vice-President.

Harriman Nat'l Bank & Trust Co. Div. No. 28.
Harriman Nat'l Bank & Trust Co. Extra Div.
Harriman Securities Corp. Dividend No. 6.

(Perforated:) Paid *7 *8 30. HNB.

7—588-670

(Stamped on Face:) Jul. 8, 1930.

(Endorsed:) Raymond Kelly. Pay to the order of The Harriman National Bank & Trust Co., Harriman Securities Corporation, W. A. Burke, Treas.

[fol. 141] DEFENDANTS' EXHIBITS AA-2, AA-3, AA-4

(These are substantially similar in form to Defendants' Exhibit AA-1.)

23. The table of photostatic sheets consisting of five (5) pages, annexed hereto and marked Exhibit H, contains a statement of the mean bid and asked prices at the end of each week commencing October 5, 1929 and ending in 1932, to the nearest quarter-dollar, of the stock of The Harriman National Bank & Trust Company. All this is prepared from data published in the Commercial & Financial Chronicle, the same being Exhibit M in the Jaskow case.

1929: 10/5, 1850; 10/12, 1912½; 10/19, 2002¼; 10/26, 1850; 11/2, 1850; 11/9, 1750; 11/16, 1800; 11/23, 1675; 11/30, 1600; 12/7, 1637½; 12/14, 1675; 12/21, 1775; 12/28; 1775.

1930: 1/4, 1775; 1/11, 1775; 1/18, 1800; 1/25, 1350; 2/1, 1425; 2/8, 1450; 2/15, 1450; 2/22, 1450; 3/1, 1450; 3/8, 1450; 3/15; 1450; 3/22, 1450; 3/29, 1450; 4/5, 1475; 4/12, 1515; 4/19, 1535; 4/26, 1535; 5/3, 1500; 5/10, 1550; 5/17, 1550; 5/24, 1525; 5/31, 1565; 6/7, 1550; 6/14, 1520; 6/21, 1550; 6/28, 1550; 7/5, 1550; 7/12, 1495; 7/19, 1550; 7/26, 1560; 8/2, 1560; 8/9, 1560; 8/16, 1550; 8/23, 1520; 8/30, 1550; 9/6, 1550; 9/13, 1565; 9/20, 1550; 9/27, 1565; 10/4, 1550; 10/11, 1550; 10/18, 1462½; 10/25, 1550; 11/1, 1550; 11/8, 1487½; 11/15, 1550; 11/22, 1505; 11/29, 1560; 12/6, 1560; 12/13, 1560; 12/20, 1550; 12/27, 1550.

1931: 1/3, 1550; 1/10, 1565; 1/17, 1565; 1/24, 1550; 1/31, 1550; 2/7, 1550; 2/14, 1550; 2/21, 1550; 2/28, 1550; 3/7, [fol. 142] 1550; 3/14, 1550; 3/21, 1550; 3/28, 1550; 4/4, 1550; 4/11, 1550; 4/18; 1550; 4/25, 1550; 5/2, 1550; 5/9, 1550; 5/16, 1550; 5/23, 1550; 5/30, 1550; 6/6, 1550; 6/13, 1550; 6/20, 1550; 6/27, 1550; 7/4, 1535; 7/11, 1535; 7/18, 1535; 7/25, 1535; 7/25, 1535; 8/1, 1535; 8/8, 1535; 8/15, 1535; 8/22, 1535; 8/29, 1535; 9/5, 1535; 9/12, 1535; 9/19,

1535; 9/26, 4535; 10/3, 1535; 10/10, 1535; 10/17, 1445; 10/24, 1465; 10/31, 1450; 11/7, 1450; 11/14, 1395; 11/21, 1440; 11/28, 1440; 12/5, 1440; 12/12, 1440; 12/19, 1440; 12/26, 1440.

1932. ½ 1440; 1/9, 1420; 1/16, 1420; 1/23, 1420; 1/30, 1420; 2/6, 1420; 2/13, 1420; 2/20, 1420; 2/27, 1420; 3/5, 1400; 3/12, 1390; 3/19, ——; 3/26, 1390; 4/2, 1390; 4/9, 1390; 4/16, 1390; 4/23, 1370; 4/30, 1370; 5/7, 1350; 5/14, 1300; 5/21, 1240; 5/28, 1290*; 6/4, 1190*; 6/11, 1190*; 6/18, 1190*; 6/25, 1100*—no further quotations published.

24. The following table contains a correct statement of the number of shares, capital funds, book value of stock, par value of stock, market value of stock, percentage of market value to book value, dividend rates and changes in capital set-up of The Harriman National Bank & Trust Company for each quarter of the year beginning October 4, 1929, and ending September 30, 1934. The same being Exhibit N in the Jaskow case.

* Asked.

[fol. 143] Harriman National Bank & Trust Bank

Date	Shares	Capital Funds	Book Value	Market Value	% Mkt. Val. to Book Val.	Par Value
September 30, 1929	15,000	$4,322,200	288.15	1800	6.24	$100
December 31, 1929	*20,000	5,009,700	250.49	1700	6.79	"
March 31, 1930	"	4,395,700	219.78	1400	6.38	"
June 30, 1930	"	4,725,000	236.25	1500	6.35	"
September 30, 1930	"	4,566,800	228.34	"	6.57	"
December 31, 1930	"	4,812,000	240.60	"	6.23	"
March 31, 1931	"	4,642,200	232.11	"	6.46	"
June 30, 1931	"	4,822,400	241.12	"	6.22	"
September 30, 1931	"	4,640,200	232.01	1485	6.43	"
December 31, 1931	"	4,863,200	243.16	1390	5.74	"
March 31, 1932	"			1340		
June 30, 1932	A "	4,209,900	210.49	(Aug. 1) 130	0.65	"
September 30, 1932	"	2,848,400	142.42	(Nov. 1) 80	0.56	"
December 31, 1932	"	2,941,000	147.05	60	0.41	"
March 31, 1933				(Feb. 1) 38		
June 30, 1933						
September 30, 1933						
December 31, 1933						
March 31, 1934						
June 30, 1934						
September 30, 1934						

* Increase in shares caused by 33 1/3% stock dividend paid in January 1930.

A Acquired Liberty National Bank by offering 1 share for each 180 shares of merged bank, but number of shares outstanding was not increased.

Dividends, pd. semiannually Jan. and July 1. 1929 to 1931, inclusive, 10% each year; Jan. 1, 1932 2½%, none since. In addition, extra dividends of 5% each have been paid Jan. and July 1, 1929—through Jan. 1, 1932. None since. Jan. 20, 1930, 33 1/3% stock dividend.

In addition Harriman Securities Corp. has paid following dividends, Jan. 3, 1929, 15%; July 5, 1929, 20%; Jan. and July, 1930 and 1931 and Jan. 8, 1932, $7.50 each.

None since.

[fol. 144] DEFENDANT'S EXHIBIT B

The Harriman National Bank & Trust Co. of the City of New York

$3,202.50. New York, Jan. 3, 1931.

Credit Harriman Securities Corp. Thirty-two hundred and two—50/100 Dollars For div. payable 1/3/31 on 183 sh. Harr. n/b & Tr. Co. n/o Raymond Kelly nominee.

F. R. ——, Cashier.

(Stamped:) 3 Jan 3 1931.

Deposited to Account of Harriman Securities Corpn. in The Harriman National Bank and Trust Company of the City of New York

New York, July 3, 1931.

Please List Each Check Separately

	Dollars	Cents
Bills		
Gold		
Silver		
Checks	4882	50

[fol. 145] HNBk.

Dividend
Checked By
Footed By

(Stamped:) 3 July 3 1931.

Deposited to Account of Harriman Securities Corp. in The Harriman National Bank and Trust Company of the City of New York

New York. July 7, 1930.

Please List Each Check Separately

	Dollars	Cents
Bills		
Gold		
Silver		
Checks		
M. H. O. Co. Inc.	916	67
L. Place Holding	34 366	68
	35 283	35
Div. Checks	2 782	50
	17	50
Checked By	38 083	35
Footed By		

[fol. 146] STIPULATION RE SUSPENSE ACCOUNT

(Same Title)

It is hereby Stipulated and Agreed by and between the attorneys for the plaintiff and the attorneys for the defendants herein that the excerpts from the suspense account printed below shall be deemed in evidence.

Dated, February 6, 1936.

Greenbaum, Wolff & Ernst, Attorneys for Plaintiff.
Conboy, Hewitt, O'Brien & Boardman, Attorneys for Defendants.

[fol. 147]
Account

Harriman Securities Corp. Suspense Account

Date 1930	Bought or Rec'd	Securities Sold or Del'd	Description	Debit	Credit	Balance Brought Forward
Oct. 29		10	CH JR 26		15 020 00	
Oct. 29		1	CH JR 26		1 495 00	
Oct. 29		1	CH JR 26		1 500 00	
Oct. 29		2	CH JR 26		3 000 00	
Oct. 29		1	CH JR 26		1 500 00	
Oct. 29		1	CH JR 26		1 500 00	
Oct. 29		1	CH JR 26		1 500 00	
Oct. 29		1	CH JR 26		1 500 00	
Oct. 29		5	CH JR 26		7 375 00	
Oct. 29		10	CH JR 26		14 750 00	147 136 00
Oct. 30		5	CH JR 27		7 510 00	
Oct. 30		2	CH JR 27		3 000 00	
Oct. 30		1	CH JR 27		1 500 00	
Oct. 30		1	CH JR 27		1 500 00	
Oct. 30		1	CH JR 27		1 500 00	
Oct. 30		5	CH JR 27		7 500 00	
Oct. 30		5	CH JR 27		7 500 00	117 126 00
Oct. 30		1	CH JR 27		1 500 00	115 626 00
Oct. 30	5		CR JR 12	7 425 00		
Oct. 30	5		CR JR 12	7 450 00		130 501 00
Oct. 31		10	CH JR 27		15 020 00	
Oct. 31		10	CH JR 27		15 020 00	
Oct. 31		2	CH JR 27		3 005 00	
Oct. 31		1	CH JR 27		1 512 00	
Oct. 31		1	CH JR 27		1 512 00	
Oct. 31		1	CH JR 27		1 512 00	
Oct. 31		1	CH JR 27		1 512 00	
Oct. 31		2	CH JR 27		3 024 00	
Oct. 31		10	CH JR 27		15 002 00	73 382 00
Oct. 31	1		CR JR 12	1 512 00		

Account

Harriman Securities Corp. Suspense Account—Continued

Date 1930	Bought or Rec'd	Securities Sold or Del'd	Description	Debit	Credit	Balance Brought Forward
Oct. 31						
Nov. 3	5		CR JR 12	7 500 00		82 394 00
Nov. 3		5	CH JR 27		7 497 00	
Nov. 3		2	CH JR 27		3 002 00	
Nov. 3		1	CH JR 27		1 500 00	
Nov. 3		10	CH JR 27		14 994 00	
Nov. 3		3	CH JR 27		4 500 00	
Nov. 3		1	CH JR 27		1 500 00	
Nov. 3		1	CH JR 27		1 500 00	47 901 00
[fol. 148]	5		CR JR 13	7 450 00		55 351 00
1391						
Jan. 16						
Jan. 17		13	TICKET		19 695 00	00
Jan. 19	4		CR JR 30	6 020 00		6 020 00
Jan. 20		2	CH JR 46		3 010 00	3 010 00
Jan. 20	5		CR JR 30	7 500 00		
Jan. 20	5		CR JR 30	7 525 00		
Jan. 21	5		CR JR 30	7 575 00		25 610 00
Jan. 21	1		TICKET	1 502 50		27 112 50
Jan. 21		33	CH JR 47		49 512 50	22 400 00
Jan. 21	5		CR JR 31	7 500 00		
Jan. 22	10		CR JR 31	14 900 00		00
Jan. 22	5		CR JR 31	7 475 00		7 475 00
Jan. 23		5	CH JR 47		7 475 00	00
Jan. 26	5		CR JR 31	7 500 00		7 500 00
Jan. 27	3		CR JR 31	4 515 00		12 015 00
Jan. 27		1	CH JR 48		1 500 00	
Jan. 28		1	CH JR 48		1 500 00	9 015 00
Jan. 28	49		TICKET	73,622 50		82 637 50
		55	CH JR 48		82 652 50	15 00

Jan.	28						
Jan.	28		1	CH JR 48		1 500 00	1 515 00
Jan.	29	1		CR JR 32	1 515 00		00
Jan.	29		1	CH JR 48		1 500 00	1 500 00
Jan.	30	1		CR JR 32	1 500 00		00
Jan.	30	3		CR JR 33	4 500 00		4 500 00
Feb.	2		3	TICKET		4 500 00	00
Feb.	2		1	CH JR 49		1 500 00	1 500 00
Feb.	3	1		CR JR 33	1 500 00		00
Feb.	3	8		TICKET	12 020 00		12 020 00
Feb.	3		2	CH JR 49		3 005 00	
Feb.	3		1	CH JR 49		1 502 50	
Feb.	3		2	CH JR 49		3 005 00	
Feb.	5		3	CH JR 49		4 507 50	00
		1		CR JR 34	1 500 00		1 500 00
							Brought Forward

[fol. 149] In United States District Court

Stipulation Settling Bill of Exceptions

It is hereby stipulated by and between the parties hereto that the foregoing bill of exceptions is correct in every particular, that it includes all of the evidence in the cause and that it may be duly signed, settled and allowed by Hon. Alfred C. Coxe, United States District Judge, who presided at the trial of this cause.

Dated Feb. 11, 1936.

Greenbaum, Wolff & Ernst, Attorneys for Plaintiff.
Conboy, Hewitt, O'Brien & Boardman, Attorneys for Defendants.

In United States District Court

Certificate to Bill of Exceptions

This is to certify that the foregoing bill of exceptions tendered by the plaintiff is correct in every particular, contains all the evidence and is hereby settled and allowed and made a part of the record in this cause and ordered to be filed.

Dated Feb. 13, 1936.

Alfred C. Coxe, United States District Judge.

[fol. 150] In United States District Court

Petition for Appeal

To the Honorable Judges of the United States District Court for the Southern District of New York:

Your petitioner Henry E. Oppenheimer, the plaintiff above named, feeling himself aggrieved by the final judgment of this court entered herein in favor of The Harriman National Bank and Trust Company and Henry E. Cooper, as Conservator of The Harriman National Bank and Trust Company of The City of New York, the above named defendants, and against the plaintiff, on the 14th day of October, 1935, does hereby appeal therefrom to the Circuit Court of Appeals for the Second Circuit, for the reasons set

forth in the assignment of errors filed herewith and he hereby prays that an appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Second Circuit, under the rules of such court in such cases made and provided.

Petitioner further prays that the amount of security for costs be fixed by order allowing this appeal.

Dated, New York, November 29th, 1935.

Greenbaum, Wolff & Ernst, Attorneys for Plaintiff, Office & P. O. Address, 285 Madison Avenue, Manhattan Borough, New York City.

[fol. 151] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Upon reading the petition for appeal and the assignment of errors filed herein November 29th, 1935, it is

Ordered that an appeal by the plaintiff to the United States Circuit Court of Appeals for the Second Circuit from the final judgment entered herein on the 14th day of October, 1935 in favor of the defendants and against the plaintiff, be and the same is hereby allowed and it is further

Ordered that the amount of the security for costs to be given by the appellant herein is fixed at the sum of $250.

Dated, New York, November 30th, 1935.

Wm. Bondy, United States District Judge.

[fol. 152] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS

To the Honorable Judge of said Court:

Now comes Henry E. Oppenheimer, the plaintiff in the above case, and files the following assignment of errors upon which he will rely in the prosecution of the appeal in the above entitled action.

1. The Court committed error in admitting over the objection and exception of the plaintiff testimony concerning transactions between defendant, The Harriman National Bank & Trust Company, and the Harriman Securities Corporation.

2. The court committed error in denying plaintiff's motion to strike out all the testimony with regard to the transactions between defendant, The Harriman National Bank & Trust Company, and the Harriman Securities Corporation; to which plaintiff duly excepted.

3. The court committed error in granting defendants' motion to direct a verdict against the plaintiff; to which plaintiff duly excepted.

4. The court committed error in denying plaintiff's motion to direct a verdict for the plaintiff; to which the plaintiff duly excepted.

5. The court committed error in denying plaintiff's motion to set aside the verdict on the ground that it was against the law and against the weight of evidence; to which plaintiff duly excepted.

6. The court committed error in holding that the defendant, The Harriman National Bank & Trust Company, was [fol. 153] not enriched by the sale of the bank stock to the plaintiff.

7. The court committed error in holding that it was necessary for the plaintiff to establish as part of his case that defendant, The Harriman National Bank & Trust Company, was enriched by the sale of the bank stock to the plaintiff.

8. The court committed error in holding that neither Mr. Harriman nor Mr. Williamson had any actual or apparent authority of defendant, The Harriman National Bank & Trust Company, to make the representations to the plaintiff in connection with the sale of the bank stock.

Wherefore plaintiff Henry E. Oppenheimer prays that the judgment in this cause for the errors aforesaid may be reversed by the United States Circuit Court of Appeals for the Second Circuit.

Greenbaum, Wolff & Ernst, Attorneys for Plaintiff,
Office & P. O. Address, 285 Madison Avenue,
Borough of Manhattan, City of New York.

[fol. 154] Citation, in usual form, omitted in printing.

[fol. 155] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true copy of the transcript of the record in said District Court in the above entitled matter as agreed to by the parties, and that comparison thereof by the Clerk is hereby waived.

Dated Feb. 11, 1936.

Greenbaum, Wolff & Ernst, Attorneys for Plaintiff.
Conboy, Hewitt, O'Brien & Boardman, Attorneys for Defendants.

[fol. 156] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 157] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1935

Argued April 17, 1936. Decided Aug. 10, 1936

No. 350

HENRY E. OPPENHEIMER, Plaintiff-Appellant,

v.

THE HARRIMAN NATIONAL BANK & TRUST COMPANY OF THE CITY OF NEW YORK and Henry E. Cooper as Conservator of the Harriman National Bank and Trust Company, Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

Action at law to recover from the Harriman National Bank & Trust Company and Henry E. Cooper as conservator of said bank the purchase price of stock which the plaintiff was induced to purchase from the bank by fraud. From a judgment directed for the defendants after both parties had moved for a directed verdict, the plaintiff appeals. Judgment reversed.

Greenbaum, Wolff & Ernst, of New York City (Edward S. Greenbaum, Newman Levy, and Benjamin Kaplan, all of New York City, of counsel), for appellant.

Conboy, Hewitt, O'Brien & Boardman, of New York City (Martin Conboy, David Asch, and William J. Butler, all of New York City, of counsel), for appellees.

Frederic P. Warfield, of New York City (Alfred L. Becker, of New York City, of counsel), for Louis J. Ehret as amicus curiæ.

SWAN, Circuit Judge:

The plaintiff, Henry E. Oppenheimer, was a depositor in the Harriman National Bank, of which Joseph W. Harriman was president and F. S. Williamson was a vice president. On October 28, 1930, Williamson called upon Oppen-

heimer, presenting a letter of introduction on bank stationery signed by Harriman. Relying upon statements made in the letter and oral statements made by Williamson, Oppenheimer was induced to purchase ten shares of stock of the bank at the price of $15,120. On November 1, he received from the bank a bill therefor which he paid by a check drawn upon his account in the bank and payable to its order. Another vice-president of the bank, Mr. Austin, acknowledged receipt of his check and sent him a stock certificate for the purchased shares. His check was marked "Paid" and the bill wes receipted. During 1931 and in January, 1932, Oppenheimer received dividends on the stock aggregating $525. He sold two shares in May, 1932, for the price of $2,408 and thereafter received a new certificate for his remaining eight shares. In the spring of 1933, when he saw a newspaper reference to the Singleton case,* he discovered that the statements which had induced his purchase were false and fraudulent. Thereupon, on May 6, 1933, he gave notice of rescission, tendered back the certificate, and demanded that his account in the bank be credited with the amount of his payment, less the sums received by him as dividends and from his sale of the two shares disposed of. The bank in the meantime had closed its doors and the defendant Cooper had been appointed its conser-
[fol. 158] vator. The plaintiff's demand for rescission being rejected, this action was instituted on May 31, 1933. It seeks judgment for $12,187 with interest from November 1, 1930. During pendency of the action, a receiver was appointed for the bank, but he has not become a party to this suit.

The amended answer of the defendants, besides a general denial, sets up the affirmative defenses of ratification after knowledge of the fraud, and of laches. At the trial the defendants were allowed further to amend "tentatively" by setting up that on and after March 4, 1933, the bank was insolvent and that debts incurred since November 1, 1930, cannot be paid out of its assets. The District Court reserved decision on whether this tentative amendment constituted a defense and never formally ruled upon it.

The defendants' proof tended to show that the stock purchased by Oppenheimer was not owned by the bank but by

* Singleton v. Harriman, 152 Misc. 323, 272 N. Y. S. 905, affirmed, 241 App. Div. 857, 271 N. Y. S. 996.

its affiliate, Harriman Securities Corporation. The bank maintained in its bond department an account known as "Harriman Securities Corporation Suspense Account," in which were reflected purchases and sales of Harriman Bank stock made for the account of said affiliate. To the extent that the account was long of the stock it represented an indebtedness of the affiliate to the bank. Certificates of stock purchased for the suspense account were put in the name of one Kelly, not an employee of the bank, as nominee of the Securities Corporation. The ten shares sold to Oppenheimer stood in Kelly's name, and the suspense account was credited with the sum received by the bank from Oppenheimer, less $100 retained by the bank as its commission on the sale. It is conceded, however, that Oppenheimer had no knowledge of any transactions between the bank and its affiliate and believed that he was dealing with the bank as a principal in his purchase of the stock. It is also conceded that a fraud was practised upon him by Harriman and Williamson, the dispute as to this being only whether the bank is chargeable with their fraud.

At the conclusion of the evidence both parties moved for a directed verdict. The District Judge granted the defendants' motion on the ground (1) that the bank was not enriched by the sale of the stock to Oppenheimer, and (2) that neither Harriman nor Williamson had actual or apparent authority to make the representations which induced his purchase. From the judgment entered pursuant to the directed verdict the plaintiff has appealed.

At the outset we may conveniently dispose of the bank's argument that recovery by the plaintiff is prohibited by the provisions of section 24 of the National Banking Act as amended by the Act of February 25, 1927 (44 Stat. 1226 § 2). This amendment provided that buying and selling of bonds, notes, or debentures, commonly known as investment securities, should be limited to buying and selling "without recourse." To say the least, it is highly doubtful whether this language can be stretched to include the purchase and sale of stock, and particularly of the bank's own stock. Compare the amendment of August 23, 1935, which uses the words "securities and stock" (49 Stat. 709, § 308 [12 U. S. C. A. § 24]). But assuming that it can, the statute would still be inapplicable to the case at bar. The evil aimed at by the statute was the incurring of liability by the bank

in consequence of an indorsement, guaranty, or repurchase agreement with respect to securities it sold. Awotin v. Atlas Exchange Bank, 295 U. S. 209, 2— 55 S. Ct. 674, 79 L. Ed. 1393. It had nothing to do with tort liability arising out of fraud; nor can it be construed to forbid incurring the liability imposed by law when a contract of sale, induced by fraud, is rescinded.

Much of the argument in the briefs is directed to the controverted question whether the bank, as a principal, sold its own stock, or, as an agent, sold stock owned by the Securities Corporation. We cannot see that this dispute is at all material here. In either event, the plaintiff dealt only with the bank; he had no knowledge that any third party was involved. If the bank sold stock belonging to its affiliate, as the defendants contend, it sold for an undisclosed principal and was itself a party to the contract. American Law Institute, Restatement of Agency, § 321. When an agent for an undisclosed principal induces a sale by fraud, he must account for the purchase price, if the contract is rescinded, even though he has paid it over to his principal. Id., § 341; McClure v. Central Trust Co., 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153. Therefore, whether the stock [fol. 159] belonged to the bank or to the Securities Corporation, the fundamental issue is the same, namely, whether the fraudulent representations of Harriman and Williamson are attributable to the bank.

Despite the defendants' contention to the contrary, we think it indubitably plain that these officers had apparent, if not actual, authority to make the sale on behalf of the bank. If the stock was property of the bank, its acquisition of it may have been ultra vires, for only in special circumstances may a bank purchase its own stock. 12 U. S. C. A. § 83. Nevertheless a corporation may transfer title to property which it was ultra vires to acquire (Lantry v. Wallace, 182 U. S. 536, 553, 21 S. Ct. 878, 45 L. Ed. 1218); and the plaintiff is not charged with notice that its ownership was unlawful, since under some circumstances it could be lawfully acquired. National Bank & Loan Co. v. Petrie, 189 U. S. 423, 424, 23 S. Ct. 512, 47 L. Ed. 879. The sale appeared to be lawful, and the bank's president and vice president had apparent authority to represent it in negotiating such sale. If, on the other hand, the stock belonged to the Securities Corporation, these officers would

have actual authority to cause the bank to make a sale as agent for the owner, whereby a commission was earned for the bank and the proceeds of the sale were applied to reduce the owner's indebtedness to the bank. Hence whichever the ownership of the stock, the officers who negotiated with the plaintiff had at least apparent authority to make the sale. If this be so, their representations incidental to the sale by the bank (either as principal or agent) are attributable to the bank, since the plaintiff had no notice that the representations were unauthorized. Salter v. Williams, 244 F. 126, (C. C. A. 3); American Law Institute, Restatement of Agency, §§ 257, 258; 7 Michie, Banks and Banking, § 173.

Therefore, if the bank were still a going concern, we should entertain no doubt that the plaintiff would have the right to rescind his purchase unless he has lost it by laches, or estoppel, which has not been contended. National Bank & Loan Co. v. Petrie, 189 U. S. 423, 23 S. Ct. 512, 47 L. Ed. 879; American Law Institute, Restatement, Contracts, §§ 476 (1), 480 (1). Nor would the power to rescind be lost by reason of his disposal of two of the purchased shares before discovery of the fraud, since prejudice to the bank is avoided by crediting it with the proceeds thereof, American Law Institute, Restatement, Contract, § 480 (2) (e); J. C. Miller Estate, Inc., v. Drury, 120 Wash. 628, 208 P. 77, 79; Henninger v. Heald, 52 N. J. Eq. 431, 29 A. 190, 193, affirmed 53 N. J. Eq. 694, 35 A. 1130; Harnden v. Hadfield, 113 Kan. 525, 215 P. 441, 442; Bagnall v. Frank Fehr Brewing Co., 203 Mo. App. 635, 221 S. W. 793, 795. See Ufland & Co. v. McMahon, 215 App. Div. 267, 279, 213 N. Y. S. 519. But the amended answer alleges that the bank was insolvent on and after March 4, 1933. This was prior to the plaintiff's demand for rescission on May 6, 1933, and the appellees contend that supervening insolvency is enough to preclude rescission.

The record contains a concession that the bank was insolvent on March 3, 1933. Since insolvency antedated the plaintiff's demand for rescission, he cannot thereby change his status from that of shareholder to that of creditor to the detriment of general creditors. Under the federal statute as to shareholders' liability (12 U. S. C. A. § 63), it is well settled that a defrauded shareholder, who had not rescinded at the time of the bank's insolvency, cannot escape

payment of an assessment made by the comptroller to meet the deficiency of assets available for the payment of all who were creditors when the bank failed. Scott v. Deweese, 181 U. S. 202, 213, 21 S. Ct. 585, 45 L. Ed. 822; Lantry v. Wallace, 182 U. S. 536, 549, 21 S. Ct. 878, 45 L. Ed. 1218; Ryan v. Mt. Vernon Nat. Bank, 224 F. 429, 430 (C. C. A. 2); Anderson v. Cronkleton, 32 F. (2d) 170 (C. C. A 8). By necessary implication the statute renders not only the fund raised by assessment, but also all of the insolvent bank's assets security for the payment of those who were creditors at the time of the bank's failure. Obviously, one who is liable to such creditors as a stockholder for assessment can neither reduce the amount he has paid as assessment nor come in to share assets he is bound to leave to the prior satisfaction of those creditors. In so far as Salter v. Williams, 244 F. 126 (C. C. A. 3), teaches the contrary, it overlooks the necessary implication of the liability statute in the case of insolvent national banks and [fol. 160] we cannot follow it. Conceivably, however, there may arise a situation in which after distribution to creditors of the bank's liquidated assets and the proceeds of the assessment, other hitherto dubious assets may realize sufficient to pay off fully the above-mentioned creditors and to leave a balance remaining to the bank. It is urged by the plaintiff that such a possibility exists here by reason of a suit brought by the receiver against certain banks on an alleged guaranty of the Harriman Bank's depositors. If by good fortune a balance should remain for distribution to shareholders, it would seem that the defrauded plaintiff should be paid in preference to distribution to nondefrauded shareholders. So, in effect, this court held in MacNamee v. Bankers' Union, 25 F. (2d) 614. See, also, Joyce & Co. v. Eifert, 56 Ind. App. 190, 105 N. E. 59. We conclude, therefore, that even if insolvency antedated the plaintiff's demand for rescission, rescission should be allowed as against the corporation, although the judgment will give the plaintiff no claim entitled to share in the assets of the receivership until after payment of all who were creditors when the bank became insolvent. Such a judgment will very likely have only an academic value, but such as it is the plaintiff would seem to be entitled to it. Accordingly, the judgment on appeal is reversed and the cause remanded, with directions to enter judgment for the plaintiff in conformity with this opinion.

[fol. 161] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of August, one thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

HENRY E. OPPENHEIMER, Plaintiff-Appellant,

vs.

HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs and the cause remanded with directions to enter a judgment for the plaintiff in conformity with the opinion of this court. Further ordered that execution issue for the collection of said costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 162] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Henry E. Oppenheimer vs. Harriman National Bank and Trust Company of the City of New York. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 17, 1936. William Parkin, Clerk.

[fol. 163] [Stamp:] United States Circuit Court of Appeals, Second Circuit. Filed Aug. 20, 1936. William Parkin, Clerk.

14553

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY E. OPPENHEIMER, Plaintiff-Appellant,

against

THE HARRIMAN NATIONAL BANK & TRUST COMPANY OF THE CITY OF NEW YORK and Henry E. Cooper as Conservator of the Harriman National Bank and Trust Company, Defendants-Appellees

PETITION FOR REHEARING

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Your petitioners, the defendants-appellees above named, pray for rehearing of the appeal in the above-entitled cause, in accordance with the provisions of Rule XXVI of the Rules of this Court, and/or for the correction of the opinion of the Court and a resettlement of the order for the issuance of mandate herein, dated August 17, 1936, in accordance with such corrected opinion, upon the following grounds, and solely in the respects hereinafter indicated, to wit:

In the opinion of this Court by Circuit Judge Swan, Circuit Judges Manton and A. N. Hand concurring, a copy of [fol. 164] which is hereto annexed, marked "Schedule A", it was held that

"if insolvency antedated the demand for rescission, the plaintiff cannot thereby change his status from that of shareholder to that of creditor to the detriment of general creditors" (p. 11, infra).

And it was further held that in such event the only judgment to which plaintiff is entitled is one against the corporation itself, which would give plaintiff the right, and only the right, to be paid in preference to non-defrauded stock-

holders if and when the creditors had been paid in full (pp. 11-13, infra).

The opinion further states that

"The record does not disclose when the bank became insolvent" (p. 11, infra).

and for that reason it has been ordered that the judgment be reversed and the cause remanded for a new trial.

The date of insolvency, antedating the demand for rescission, is conceded in the record.

The demand for rescission was made on May 6, 1933 (Rec., fols. 18, 85-7, Pltff.'s Ex. 7, pp. 72-3, Opinion, p. 11, infra).

The Bank was insolvent on March 3, 1933, as appears from the following, at folios 140-141 of the record:

"Mr. Asch: All right. Now, will it further be conceded that on March 3, 1933, The Harriman National Bank and Trust Company was insolvent?

[fol. 165] "Mr. Levy: What is the date?

"Mr. Asch: The date of the bank holiday.

"Mr. Levy: Oh, yes."

Upon the foregoing facts, and in accordance with the opinion of this Court, the judgment of the District Court so far as it dismisses, with costs, the complaint as against the defendant Henry E. Cooper as Conservator of The Harriman National Bank and Trust Company of the City of New York, should be affirmed, with costs of this appeal, and the judgment so far as it dismisses the complaint as against the defendant The Harriman National Bank and Trust Company of the City of New York should be reversed, and judgment entered with appropriate costs against the said Bank, collectible only out of the assets of said Bank remaining after all depositors and creditors, and the expenses of liquidation, have been paid in full.

Wherefore, upon the foregoing grounds, your petitioners pray that this Court grant relief as aforesaid.

Dated, New York, August 19, 1936.

Respectfully submitted, The Harriman National Bank and Trust Company of the City of New York, Henry E. Cooper, As Conservator of The Harriman National Bank and Trust Company of the City of New York, by David Asch, Counsel for Petitioners.

[fol. 166] I hereby certify that I have examined the foregoing petition and that in my opinion the petition is well founded in point of law and is not interposed for the purpose of delay.

Dated, New York, August 19, 1936.

David Asch, Counsel for Petitioners.

[fol. 167] [Stamp:] United States Circuit Court of Appeals, Second Circuit. Filed Sep. 15, 1936. William Parkin, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY E. OPPENHEIMER, Plaintiff-Appellant,

against

THE HARRIMAN NATIONAL BANK & TRUST COMPANY OF THE CITY OF NEW YORK and Henry E. Cooper as Conservator of The Harriman National Bank & Trust Company, Defendants-Appellees

PETITION FOR REHEARING

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Comes now the plaintiff-appellant above named, and respectfully presents his petition for a rehearing pursuant to Rule 29 of the Rules of this Court in order that he may be permitted to address himself to an issue decided by this Court which was not briefed or argued by him (or, indeed, by defendants-appellees), as it was not deemed relevant upon this appeal or within the scope of the Court's jurisdiction. The issue referred to is whether plaintiff's judgment against The Harriman National Bank & Trust Company and Henry E. Cooper as Conservator of said Bank will share equally with other creditors' claims in the assets of the Bank or be subordinated to them.

[fol. 168] This is an action at law brought by the plaintiff, a depositor of The Harriman National Bank & Trust Company, upon a completed rescission, to recover from the Bank and Henry E. Cooper as Conservator of said Bank,

the price paid for stock of the Bank which he was induced to purchase through fraudulent representations of the Bank. The stock was paid for by a withdrawal by plaintiff from his deposit account with the Bank. He seeks in this action to be reinstated to the position he would have been in if he had not been defrauded, that is, to have his deposit account credited with that amount.

A trial was had before Judge Coxe and a jury, and after cross motions for a directed verdict, a judgment was entered upon an order directing a verdict for the defendants. From that judgment of the District Court plaintiff appealed to this Court.

Since this action is at law, plaintiff-appellant assumed that the only issue before the Court, as in all other actions of law, was whether or not he was entitled to a money judgment against the defendants. The question whether his claim, based upon that judgment, ranked on a parity with other classes of claims, was not believed to be relevant on this appeal, but was deemed to be a matter to be determined in the first instance by the Comptroller of the Currency in appropriate proceedings. Indeed, in appellant's view of the law, it was a matter of considerable doubt whether the Court at this stage had jurisdiction to determine the question of priorities. See Riehle v. Margolies, 279 U. S. 218 (1929).

[fol. 169] For these reasons appellant deliberately refrained from considering the question of priority, expressly pointing out in his brief (p. 41) and reply brief (p. 19) that the "sole question in the present case is whether the plaintiff has a claim against the Bank, because of the fraud admittedly practiced upon him, as a depositor of the Bank," and that the "manner in which his claim is to be treated, how he shall rank with other classes of claimants and the like, are questions to be decided by the Comptroller of the Currency."

On August 15th last, this Court, per Swan, J., filed its opinion, and on August 26th its amendatory opinion, holding in substance that the plaintiff had a right to rescind as against the Bank after insolvency unless he had lost this right by laches or estoppel, which was not contended. It ordered that the judgment be reversed and directed that judgment be entered for the plaintiff.

The Court went further, however, and ruled that since insolvency of the Bank antedated plaintiff's demand for

rescission, his claim was junior and subordinate to those of other creditors of the Bank.

Reargument is sought on two grounds.

First Ground

The defendants did not plead insolvency. At the trial they attempted to amend their answer by alleging that the Bank was insolvent on March 3, 1933. To this proposed amendment plaintiff objected and the Court reserved decision thereon (fol. 43). The Court never passed on the amendment and throughout the trial the pleading remained [fol. 170] unamended and contained no allegation of insolvency. That question therefore was not in issue. At the trial the defendants asked whether it would be conceded that the Bank was "inslovent" on March 3, 1933 (fol. 140). This concession was made, but the plaintiff expressly refused to concede insolvency in the sense that the liabilities of the Bank exceeded its assets (fols. 157, 158).

In the original opinion filed by this Court on August 15th, the Court stated that the right of the plaintiff to share on a parity with those of other creditors of the Bank depended upon whether or not the demand for a rescission antedated the insolvency of the Bank. The Court's attention being called to the concession referred to above as to the "insolvency" of the Bank on March 3, 1933, it filed its amended opinion stating that the Bank's "insolvency" antedated the demand for rescission and consequently that plaintiff's claim was subordinate to those of other classes of claimants. This holding was made solely on the basis of the concession just referred to.

Though the question of "insolvency" was not in issue it is important under the amended ruling of this Court that the actual facts with regard thereto be determined. While it may be that the Bank was "insolvent" in the sense that it was not able to meet its current obligations, plaintiff never admitted that the Bank was "insolvent" in any other sense. Indeed, it is believed that the Bank was not "insolvent" in the true bankruptcy sense of excess of liabilities over assets, until long after plaintiff rescinded. Thus, in an action brought in the District Court by the Receiver [fol. 171] of the Bank against Arthur S. Allen, and others, the Receiver alleged in a verified complaint that "on or about October 16, 1933, the said Comptroller of the Cur-

rency duly found that the said Bank was insolvent and unable to pay its just and legal debts." This allegation by the Receiver appears to negative the fact of "insolvency" in the bankruptcy sense on March 3, 1933. Furthermore, we are informed that in an action brought by the Comptroller against the clearing house banks in the Supreme Court, New York County, it was proved that in June, 1936, the Bank had already paid a dividend to depositors of 76% and that it was in a position to pay an additional dividend of 10%, and that in addition to the assets required for that purpose it had received $750,000 from the National City Bank in settlement of a claim against it, and had other assets including a claim against directors to enforce which an action for an accounting seeking $6,000,000 is pending.

Plaintiff takes the position (a) that he concedes the Bank was not able to meet its current obligations on March 3, 1933—it was "insolvent" in the equity sense; but (b) that he does not concede there was an excess of liabilities over assets at the time he rescinded in May, 1933. On this latter question he desires a trial. Accordingly, he asks that this Court remand for trial the issue of fact thus presented, unless it is of the opinion that mere equity insolvency at the date of rescission is enough to cut off the plaintiff's right to share pari passu with other creditors. We do not believe this Court intended so to hold.

[fol. 172] Second Ground

As an additional and separate ground for reargument and correction, petitioner submits with deference that the ruling of this Court (whether "insolvency" be taken to mean "equity" or "bankruptcy" insolvency) is erroneous. It is his contention that his claim as a defrauded depositor and creditor of the Bank is on a par with other claims, regardless of whether insolvency antedated the recission. And waiving the question of the jurisdiction of this Court to decide the issue of priority in an action at law he is desirous of an opportunity to meet that issue on the merits.

The first ground for reargument and correction requires no further elaboration. The accompanying brief is addressed to the second ground only.

Wherefore, petitioner respectfully prays that a rehearing be granted and, upon such rehearing, for a ruling that the claim of the plaintiff shall share equally with those of

other creditors in the assets of the insolvent Bank, or for an order remanding the cause for a trial of the issue of the date of insolvency of the Bank, and, pending determination of this motion, for a stay of the mandate herein, and for such other relief as may be just and proper.

Dated, New York, September 15, 1936.

Respectfully submitted, Henry E. Oppenheimer, by Edward S. Greenbaum, Counsel for Petitioner.

[fol. 173] Certificate of Counsel

I hereby certify that I have examined the foregoing petition, which is presented in good faith and not for the purposes of delay, and that in my opinion it is well founded and is entitled to the favorable consideration of the Court.

Edward S. Greenbaum, Counsel for Plaintiff-Appellant.

[fol. 174] United States Circuit Court of Appeals for the Second Circuit

Henry E. Oppenheimer, Appellant,

against

The Harriman National Bank & Trust Company of the City of New York and Henry E. Cooper as Conservator of the Harriman National Bank and Trust Company, Appellees

Before Manton, Swan and A. N. Hand, Circuit Judges

Davis Asch, Esq., Counsel for Petitioners.

Per Curiam:

Petition for rehearing denied.

——— ———, Circuit Judges.

Filed Sept. 21/1936.

[fol. 175] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 21st day of September, one thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

HENRY E. OPPENHEIMER, Plaintiff-Appellant,

vs.

HARRIMAN NATIONAL BANK & TRUST COMPANY OF THE CITY OF NEW YORK et al., Defendants-Appellees

A petition for a rehearing having been filed herein by counsel for the defendants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 176] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Henry E. Oppenheimer vs. Harriman National Bank & Trust Company, etc., et al. Order. United States Circuit Court of Appeals, Second Circuit. Filed Sep. 21, 1936. William Parkin, Clerk.

[fol. 177] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY E. OPPENHEIMER, Appellant,

against

THE HARRIMAN NATIONAL BANK & TRUST COMPANY OF THE CITY OF NEW YORK and Henry E. Cooper as Conservator of The Harriman National Bank & Trust Company, Appellees

Before Manton, Swan and A. N. Hand, Circuit Judges

Greenbaum, Wolff & Ernst, Esqs., Attorneys for Appellants. Edward S. Greenbaum, Newman Levy, of Counsel.

Per CURIAM:

Petition for rehearing denied.

——, Circuit Judges.

Filed Oct. 14/1936.

[fol. 178] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 14th day of October, one thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

HENRY E. OPPENHEIMER, Plaintiff-Appellant,

vs.

HARRIMAN NATIONAL BANK & TRUST COMPANY OF THE CITY OF NEW YORK et al., Defendants-Appellees

A petition for a rehearing having been filed herein by counsel for the plaintiff,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 179] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Henry E. Oppenheimer vs. Harriman National Bank & Trust Company of the City of New York. Order. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 14, 1936. William Parkin, Clerk.

[fol. 180] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY E. OPPENHEIMER, Plaintiff-Appellant,

against

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK et al., Defendants-Appellees

SIRS:

Please Take Notice that upon the amended opinion filed herein on the 26th day of August, 1936, and upon all the proceedings heretofore had herein, the defendants-appellees will move this Court at a term thereof to be held in the United States Court House, Foley Square, in the Borough of Manhattan, New York City, on October 19, 1936, at 10:30 o'clock A. M., or as soon thereafter as counsel can be heard, for an order in the form annexed hereto re-settling the order heretofore entered in the office of the Clerk of this Court on the 17th day of August, 1936, and for such other and further relief as to the Court may seem proper.

Yours, etc., Conboy, Hewitt, O'Brien & Boardman, Attorneys for Defendant-Appellees, Office & P. O. Address, 39 Broadway, Borough of Manhattan, New York City.

To Greenbaum, Wolff & Ernst, Esqs., Attorneys for Plaintiff-Appellant, 285 Madison Avenue, New York City.

[fol. 181] At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the — day of September, One Thousand Nine Hundred and Thirty-six.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

HENRY E. OPPENHEIMER, Plaintiff-Appellant,

against

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK et al., Defendants-Appellees

An order having been entered herein on the 17th day of August, 1936, upon the opinion of this Court filed August 10, 1936, and the said opinion of this Court having been amended by order of this Court, such amendment having been filed on the 26th day of August, 1936,

Now, on motion of Conboy, Hewitt, O'Brien & Boardman, attorneys for defendants-appellees, it is

Ordered that the said order dated August 17, 1936 be and the same hereby is re-settled so as to read as follows:

[fol. 182] At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 17th day of August, One Thousand Nine Hundred and Thirty-six.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

HENRY E. OPPENHEIMER, Plaintiff-Appellant,

against

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby

Ordered, Adjudged and Decreed that the judgment of said District Court, so far as it dismisses the complaint as against the defendant The Harriman National Bank and Trust Company of the City of New York, be and it hereby is reversed, with costs, and judgment, as demanded in said complaint with costs, be entered against the said Bank,

[fol. 183] collectible, both as to such judgment and costs of appeal, only out of the assets of said Bank remaining for distribution to stockholders after all depositors and creditors and the expenses of liquidation have been paid in full; and it is

Further Ordered, Adjudged and Decreed, that the said judgment of the said District Court, so far as it dismisses, with costs, the complaint as against the defendant Henry E. Cooper, as Conservator of The Harriman National Bank and Trust Company of the City of New York, be and it hereby is affirmed, with costs of this appeal; and it is

Further Ordered, Adjudged and Decreed that the cause be remanded with directions to enter judgment in conformity herewith and that a mandate issue to the said District Court in accordance with this decree.

[fol. 183½] [Endorsed:] Clerk's Index. No. —. —— —, 193-. United States Circuit Court of Appeals for the Second Circuit. Henry E. Oppenheimer, Pl'ff-Appellant, against The Harriman National Bank and Trust Company, etc., et al., Def'ts-Appellees. Notice of Motion. Conboy, Hewitt, O'Brien & Boardman, Attorneys for Def'ts-Appellees, Office and Post-Office Address, 39 Broadway, New York City. Due and timely service of a copy of the within is hereby admitted.

Dated, New York, —— —, 19—. —— ——, Attorney for ——.

[fol. 184] At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the —day of October, One Thousand Nine Hundred and Thirty-six.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

HENRY E. OPPENHEIMER, Plaintiff-Appellant,
against
THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK et al., Defendants-Appellees

PLAINTIFF-APPELLANT'S PROPOSED ORDER

An order having been entered herein on the 17th day of August, 1936, upon the opinion of this court filed August 10,

1936, and this court having filed an amendatory opinion on the 26th day of August, 1936, it is

Ordered, that the said order dated August 17, 1936, be and the same hereby is resettled so as to read as follows:

[fol. 185] "At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 17th day of August, One Thousand Nine Hundred and Thirty-six.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

HENRY E. OPPENHEIMER, Plaintiff-Appellant,

against

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK et al., Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby

Ordered, Adjudged and Decreed, that the judgment of said District Court be and it hereby is reversed with costs; and it is further

[fol. 186] Ordered, Adjudged and Decreed, that judgment for the amount demanded in the complaint be entered against the defendants, The Harriman National Bank and Trust Company of the City of New York and Henry E. Cooper as Conservator of said Bank, collectible out of the assets of the receivership after payment in full of all who were creditors when the Bank became insolvent; and it is further

Ordered, Adjudged and Decreed, that plaintiff have judgment for costs and that execution issue forthwith for the collection of said costs, and it is further

Ordered, Adjudged and Decreed, that a mandate issue to the said District Court in accordance with this decree.

——, Clerk."

[fol. 186½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Henry E. Oppenheimer, Plaintiff-Appellant, against The Harriman National Bank and Trust Company of the City of New York et al., Defendants-Appellees. Plaintiff-Appellant's Proposed Order. Greenbaum, Wolff & Ernst, Attorneys for Plaintiff-Appellant, No. 285 Madison Avenue, Borough of Manhattan, New York City.

[fol. 187] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1935

Motion Argued Oct. 19, 1936. Decided Nov. 2, 1936

No. 350

HENRY E. OPPENHEIMER, Appellant,

v.

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK et al., Appellees

Before Manton, L. Hand, and Swan, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

Per CURIAM:

The order of this court will be resettled to read as follows:

"Ordered, adjudged, and decreed, that the judgment of the District Court be reversed; and it is further

"Ordered, adjudged, and decreed that the action be dismissed as to the defendant Henry E. Cooper as conservator of the Harriman National Bank & Trust Company of the City of New York inasmuch as it appears that a receiver was appointed for said bank during the pendency of said action; and it is further

"Ordered, adjudged, and decreed that judgment for the amount demanded in the complaint be entered against the defendant the Harriman Bank & Trust Company of the City of New York collectible out of the assets of the receivership after payment in full of all who were creditors

when the said bank became insolvent; and it is further

"Ordered, adjudged, and decreed that plaintiff have judgment for costs to be paid in due course out of the receivership estate, and it is further

"Ordered, adjudged, and decreed, that the cause be remanded and a mandate issue to said District Court in accordance with this decree."

[fol. 188] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 9th day of November, one thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

HENRY E. OPPENHEIMER, Plaintiff-Appellant,

vs.

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK, et al., Defendants-Appellees

A motion having been made herein to resettle the order for mandate of this Court heretofore entered herein,

Upon consideration thereof it is

Ordered that said order for mandate be and hereby is resettled to read as follows;

"Ordered, Adjudged and Decreed, that the judgment of the District Court be reversed; and it is further

Ordered, Adjudged and Decreed that the action be dismissed as to the defendant Henry E. Cooper as Conservator of The Harriman National Bank and Trust Company of the City of New York in as much as it appears that a receiver was appointed for said Bank during the pendency of said action; and it is further

Ordered, Adjudged and Decreed that judgment for the amount demanded in the complaint be entered against the defendant The Harriman Bank and Trust Company of the City of New York collectible out of the assets of the

receivership after payment in full of all who were creditors when the said bank became insolvent; and it is further

Ordered, Adjudged and Decreed that plaintiff have judgment for costs to be paid in due course out of the receivership estate, and it is further

Ordered, Adjudged and Decreed, that the cause be remanded and a mandate issue to said District Court in accordance with this decree."

Wm. Parkin, Clerk.

[fol. 189] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Henry E. Oppenheimer vs. Harriman National Bank and Trust Company of the City of New York. Order. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 9, 1936. William Parkin, Clerk.

[fol. 190] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 189, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Henry E. Oppenheimer, Plaintiff-Appellant, against The Harriman National Bank and Trust Company of the City of New York et al., Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this seventh day of December, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the said United States the one hundred and sixty-first.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 191] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 588

ORDER ALLOWING CERTIORARI—Filed February 8, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 192] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 670

ORDER ALLOWING CERTIORARI—Filed February 8, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 41,128, 41,210. U. S. Circuit Court of Appeals, Second Circuit. Term No. 588. Henry E. Oppenheimer, petitioner, vs. The Harriman National Bank and Trust Company of the City of New York, et al. Filed December 22, 1936. Term No. 670. The Harriman National Bank and Trust Company of the City of New York, petitioner, vs. Henry E. Oppenheimer. Petitions for writs of certiorari and exhibit thereto. Filed January 23, 1937. Term Nos. 588, O. T., 1936, 670, O. T. 1936.

DEC 22 1936
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 588

HENRY E. OPPENHEIMER,

Petitioner,

—against—

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK and HENRY E. COOPER as Conservator of THE HARRIMAN NATIONAL BANK AND TRUST COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

EDWARD S. GREENBAUM,
Solicitor for Petitioner,
Henry E. Oppenheimer,
No. 285 Madison Avenue,
New York, N. Y.

THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No.....

HENRY E. OPPENHEIMER,

Petitioner,

—against—

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK and HENRY E. COOPER as Conservator, *etc.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

May it please the Court:

Henry E. Oppenheimer, by his solicitor, respectfully prays that a writ of *certiorari* issue to review the resettled judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above-entitled action at law on November 9, 1936 (R. 188).*

---

* A judgment was entered herein by the Circuit Court of Appeals on August 17, 1936 upon its opinion filed August 10, 1936. Thereafter rehearing was applied for by both the respondents and the petitioner, and was in each case denied (September 21, 1936; October 14, 1936). On August 26, 1936, the Circuit Court of Appeals filed its amended opinion (which is, however, printed under date of August 10, 1936), and on November 9, 1936 entered its resettled judgment thereon. The resettled judgment is the judgment here sought to be reviewed. Mandate has duly issued to the District Court, which has entered a judgment identical with that entered by the Circuit Court of Appeals.

Said resettled judgment of the Circuit Court of Appeals:

(1) reverses a judgment of the District Court for the Southern District of New York in favor of the respondents, Harriman National Bank and its Conservator (defendants below), entered upon an order directing a verdict for the respondents after cross motions at the trial for a directed verdict;

(2) orders that judgment be entered for the petitioner (plaintiff below) against the respondent Bank, which is now in receivership,* for the amount demanded in the complaint, *but that such judgment may be collected by the petitioner only after payment in full out of the assets of the receivership of all who were creditors of the Bank at the time it became insolvent.*

As will appear more particularly below, the error claimed is that petitioner's judgment should not have been so subordinated, but should have been given equal ranking with other unsecured creditors' claims.

Opinions of the Courts Below.

The District Court (Coxe, *D. J.*) did not file a formal opinion, but stated its reasons for directing a verdict in favor of the respondents at Record 63. The amended opinion of the Circuit Court of Appeals upon reversal (Swan, *C. J.*) is reported in 85 F. (2d) 582 (R. 157-60).

---

* The action was ordered dismissed as to the respondent Conservator "in as much as it appears that a receiver was appointed for said Bank during the pendency of said action" (R. 188).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C., Section 347 [a]). The resettled judgment of the Circuit Court of Appeals sought to be reviewed herein was entered on November 9, 1936.

Summary Statement of the Matters Involved.

The action is at law for damages upon an executed rescission of the sale to the petitioner of certain shares of stock of respondent Harriman National Bank. The complaint alleges that the petitioner was and still is a depositor in the respondent Bank; that as a result of fraudulent representations made by the Bank to the petitioner as a depositor, he was induced to and did purchase ten shares of Bank stock on November 1, 1930; that the purchase was made in reliance on false representation made by the Bank with intent to deceive the petitioner, and that as soon as the petitioner discovered the fraud he elected to and did rescind the transaction, giving notice thereof to both the Bank and its Conservator (who was appointed in March, 1933), and tendering back the stock. He sues for the price paid less proper offsets, joining the Bank and its Conservator as parties defendant.

The petitioner has paid the statutory assessment levied against him as a National Bank stockholder (without prejudice to the present action) and has in no respect challenged that assessment or sought repayment thereof.

The facts proved under the complaint, as well as the defenses interposed by the respondents, are fairly summarized in the following extract from the amended opinion of the Circuit Court of Appeals.

"The plaintiff, Henry E. Oppenheimer, was a depositor in the Harriman National Bank, of which Joseph W. Harriman was president and F. S. Williamson was a vice president. On October 28, 1930, Williamson called upon Oppenheimer, presenting a letter of introduction on bank stationery signed by Harriman. Relying upon statements made in the letter and oral statements made by Williamson, Oppenheimer was induced to purchase ten shares of stock of the bank at the price of $15,120. On November 1, he received from the bank a bill therefor which he paid by a check drawn upon his account in the bank and payable to its order. Another vice-president of the bank, Mr. Austin, acknowledged receipt of his check and sent him a stock certificate for the purchased shares. His check was marked 'Paid' and the bill was receipted. During 1931 and in January, 1932, Oppenheimer received dividends on the stock aggregating $525. He sold two shares in May, 1932, for the price of $2,408 and thereafter received a new certificate for his remaining eight shares. In the spring of 1933, when he saw a newspaper reference to the *Singleton* case,* he discovered that the statements which had induced his purchase were false and fraudulent. Thereupon, on May 6, 1933, he gave notice of rescission, tendered back the certificate, and demanded that his account in the bank be credited with the amount of his payment, less the sums received by him as dividends and from his sale of the two shares disposed of. The bank in the meantime had closed its doors and the defendant Cooper had been appointed its conservator. The plaintiff's demand for rescission being rejected, this action was instituted on May 31, 1933. It seeks judgment for

* [Court's footnote] *Singleton* v. *Harriman National Bank*, 152 Misc. 323, aff'd 241 N. Y. App. Div. 857.

$12,187 with interest from November 1, 1930. During pendency of the action, a receiver was appointed for the bank, but he has not become a party to this suit.

"The amended answer of the defendants, besides a general denial, sets up the affirmative defenses of ratification after knowledge of the fraud, and of laches. [These affirmative defenses were abandoned at the trial.] At the trial the defendants were allowed further to amend 'tentatively' by setting up that on and after March 4, 1933, the bank was insolvent and that debts incurred since November 1, 1930, cannot be paid out of its assets. The District Court reserved decision on whether this tentative amendment constituted a defense and never formally ruled upon it.

"The defendants' proof tended to show that the stock purchased by Oppenheimer was not owned by the bank but by its affiliate, Harriman Securities Corporation. The bank maintained in its bond department an account known as 'Harriman Securities Corporation Suspense Account,' in which were reflected purchases and sales of Harriman Bank stock made for the account of said affiliate. To the extent that the account was long of the stock it represented an indebtedness of the affiliate to the bank. Certificates of stock purchased for the suspense account were put in the name of one Kelly, not an employee of the bank, as nominee of the Securities Corporation. The ten shares sold to Oppenheimer stood in Kelly's name, and the suspense account was credited with the sum received by the bank from Oppenheimer, less $100. retained by the bank as its commission on the sale. It is conceded, however, that Oppenheimer had no knowledge of any transactions between the bank and its affiliate and believed that he was dealing with the bank as a principal in his purchase of the stock.

It is also conceded that a fraud was practised upon him by Harriman and Williamson,* the dispute as to this being only whether the bank is chargeable with their fraud.

"At the conclusion of the evidence both parties moved for a directed verdict. The District Judge granted the defendants' motion on the ground (1) that the bank was not enriched by the sale of the stock to Oppenheimer, and (2) that neither Harriman nor Williamson had actual or apparent authority to make the representations which induced his purchase. From the judgment entered pursuant to the directed verdict the plaintiff has appealed."

The Circuit Court of Appeals reversed the judgment, holding upon abundant evidence that Williamson and Harriman had apparent if not actual authority to make the sale and that the representations incidental to the sale were attributable to the Bank. This was so, said the court, "whether the bank, as a principal, sold its own stock, or, as an agent, sold

---

* The fraud referred to by the court consisted of the following: The market for Harriman National Bank stock had been artificially rigged over a considerable period of time by regular purchases of the stock (usually at the close of each business day) by the Bank, which placed the stock so acquired into the "suspense account". For about two years these final bids, which were relayed from over-the-counter dealers to certain dealers' associations and thence to the newspapers, reflected almost exclusively sales by the dealers to the Bank. There was no real market; the public quotations were fictitious; they concealed a continuous and drastic decline in real value.

As part of the scheme it became necessary to unload the stock which had been so acquired. This was done by inducing certain depositors to buy Bank stock by reference to the deceptive public market quotations and by other fraudulent representations. Among other things Williamson referred the petitioner to the quotations and stated that the stock came "from an estate". He knew that the market was rigged and he knew that the stock did not come from an estate but from the "suspense account".

Further description of the fraud is unnecessary here because, as stated by the Circuit Court of Appeals, the respondents frankly conceded that a fraud was practiced upon the petitioner (R. 38-9).

stock owned by the Securities Corporation. * * * In either event, the plaintiff dealt only with the bank; he had no knowledge that any third party was involved. If the bank sold stock belonging to its affiliate, as the defendants contend, it sold for an undisclosed principal and was itself a party to the contract." Therefore the petitioner was held entitled to a judgment for the amount demanded in the complaint. So far the Circuit Court of Appeals was plainly correct.

Coming, however, to the precise question sought to be reviewed herein, namely, the question of the ranking of petitioner's judgment as a claim against the Bank in receivership, the court ruled that, the demand for rescission having been made after the Bank became insolvent (insolvency conceded as of March 3, 1933; demand for rescission on May 6, 1933), the judgment must be subordinated to the claims of all who were creditors of the Bank at the time it became insolvent. The resettled judgment accordingly reads in part: "Ordered, * * * that judgment for the amount demanded in the complaint be entered against the defendant * * * Bank * * * *collectible out of the assets of the receivership after payment in full of all who were creditors when the said bank became insolvent.*"

In sum, therefore, *the Circuit Court of Appeals has held that a claim for fraud as to the sale of Bank stock, asserted through rescission of the sale after the insolvency of the Bank, must be subordinated to the claims of all other creditors.* It is to be noted that this cause does *not* involve fraud in a subscription to an *original issue* of Bank stock, but in a *resale* of stock *previously issued and paid-up,* and (in respondents' own view of the facts) actually owned

and held by a third party prior to the fraudulent sale. The court's holding on the question here sought to be reviewed is clear-cut; there is no complicating feature in the case such as laches or estoppel—which, indeed, are specifically negatived by the opinion below.

The court recognized that "such a [subordinated] judgment will very likely have only an academic value." Moreover, as indicated in the court's own opinion, its decision herein is contrary to the decision of the Circuit Court of Appeals for the Third Circuit in *Salter* v. *Williams,* 244 Fed. 126 (*app. dism.,* 250 U. S. 653). The court nevertheless felt that the result was compelled "by necessary implication" from the terms of the Federal statute as to National Bank shareholders' liability (12 U. S. C., Sections 63 and 64). Following is the court's reasoning:

> "Under the federal statute as to shareholders' liability (12 U. S. C. A. §63), it is well settled that a defrauded shareholder, who had not rescinded at the time of the bank's insolvency, cannot escape payment of an assessment made by the comptroller to meet the deficiency of assets available for the payment of all who were creditors when the bank failed. * * * By necessary implication the statute renders not only the fund raised by assessment, but also all of the insolvent bank's assets security for the payment of those who were creditors at the time of the bank's failure. Obviously, one who is liable to such creditors as a stockholder for assessment can neither reduce the amount he has paid as assessment nor come in to share assets he is bound to leave to the prior satisfaction of those creditors."

We repeat and emphasize that the petitioner has actually paid the stock assessment levied against him.

Statute Involved.

As above-noted, the Circuit Court of Appeals deemed relevant the Federal statute as to National Bank shareholders' liability (12 U. S. C., Sections 63 and 64), which provides as follows:

> "§63. *Individual liability of shareholders.* The shareholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; * * *
>
> "§64. *Individual liability of shareholders; transfer of shares.* The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure."

Specification of Error.

Petitioner contends that his judgment for fraud should have been held entitled to rank on a parity with other unsecured creditors' claims against the assets of the receivership. The net effect of such a decision will be to reinstate petitioner's deposit balance in the Bank to the extent of the withdrawal from his account used to make the purchase, and allow him to assert a general claim therefor in the receivership.

Questions Presented.

1. Did the Circuit Court of Appeals err in holding that a claim for damages for fraud in the sale of Bank stock, asserted through rescission after the insolvency of the Bank, must be subordinated to the claims of all who were creditors of the Bank at the time it became insolvent? Or should such a claim, in the absence of laches or estoppel, have been held entitled to rank on a parity with other unsecured creditors' claims?

2. Assuming without conceding that such subordination is proper where the sale is of an *original issue* of Bank stock, is such subordination proper where, as here, the stock sold had been *previously issued and fully paid-up, and, on respondents' own view of the facts, was actually owned and held by a third party, having been sold by the Bank as agent?*

3. Did the Circuit Court err in holding that such subordination was compelled by "necessary implication" from the terms of the Federal statute as to National Bank shareholders' liability (12 U. S. C., Sections 63 and 64)?

Reasons Relied on for the Allowance of the Writ.

I. *The Circuit Court of Appeals for the Second Circuit has rendered a decision herein in conflict with the decisions of other Circuit Courts of Appeals on the same matter.*—The court's amended opinion expressly indicates that the ruling herein subordinating the petitioner's judgment is contrary to the decision in *Salter* v. *Williams,* 244 Fed. 126 (C. C. A. 3), *app. dism.,* 250 U. S. 653. It is also contrary to the decisions in *Clark* v. *Boston-Continental Nat. Bank,* 84 F. (2d) 605 (C. C. A. 1), and *Same* v. *Same,* 84 F. (2d) 607 (C. C. A. 1), handed down June 25, 1936. There are several other conflicting decisions of the Circuit Courts of Appeals on this matter. (Brief, Point I, *infra.*)

II. *The Circuit Court of Appeals for the Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.*—The question raised herein was expressly reserved by this Court in *Lantry* v. *Wallace,* 182 U. S. 536, 555, and was recognized to be an important question. *Id.,* p. 547. It deserves a final, authoritative decision. (Brief, Point II, *infra.*)

III. *The Circuit Court of Appeals for the Second Circuit has decided an important question of the construction of a Federal statute in a way probably untenable.*—We shall attempt to show that the court misinterpreted and misapplied 12 U. S. C., Sections 63 and 64. (Brief, Point III, *infra.*)

WHEREFORE your petitioner respectfully prays that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Second Circuit to the end

that the cause may be reviewed and determined by this Court and the judgment of the Circuit Court of Appeals modified.

Dated, New York, N. Y., December 7, 1936.

EDWARD S. GREENBAUM,
Solicitor for Petitioner,
Henry E. Oppenheimer.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions in the Courts Below.

The District Court (Coxe, *D. J.*) did not file a formal opinion, but expressed the reasons for its ruling at Record 63. The amended opinion of the Circuit Court of Appeals (Swan, *C. J.*) is reported in 85 F. (2d) 582 (R. 157-60).

Jurisdiction.

The resettled judgment of the Circuit Court of Appeals was entered on November 9, 1936 (R. 188). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C., Section 347 [a]).

POINT I.

The decision herein, subordinating petitioner's judgment for fraud upon rescission of the sale of stock, is in conflict with the decisions of other Circuit Courts of Appeals. This Court should resolve the conflict.

It is now settled law, as recognized by the court below, that the insolvency of a National Bank does not *per se* prevent rescission of the sale of its stock on the ground of fraud. See, *e. g., Ryan* v. *Mt. Vernon Nat. Bank,* 206 Fed. 452 (C. C. A. 2). There is, however, a decided conflict of authority on the question whether the judgment for fraud may rank on a parity with other unsecured creditors' claims against the assets of the insolvent Bank, or must be subordinated to such claims. This is the precise issue at bar.

The amended opinion of the court below, in refusing to follow *Salter* v. *Williams*, 244 Fed. 126 (C. C. A. 3), *app. dism.*, 250 U. S. 653,* expressly recognizes that such a conflict exists. Analysis of the authorities indicates that the First, Fourth and Fifth Circuits side with the *Salter* case, while the decision herein finds support in the Ninth Circuit. In addition there are some courts, both Federal and State, in which the question has been adverted to, but not clearly defined or decided.

Salter v. *Williams* (C. C. A. 3), *supra*, is identical on its facts with the cause at bar. One Young was indebted to the National Bank; the Comptroller directed the Bank to reduce the loan. As Young owned certain shares of Bank stock, it was proposed that a purchaser be found for them and the sale price be credited on the loan. The Bank president made false representations to the plaintiff, as a result of which the plaintiff bought the stock, the proceeds being applied to Young's loan—in much the same way as the proceeds of the sale to the petitioner herein were used to reduce the indebtedness of the affiliate to the respondent Bank. After insolvency and receivership of the Bank, suit was brought to rescind the transaction. The court held that the Bank was chargeable with the fraud of its president, and then inquired whether the judgment was entitled to share equally with the claims of other unsecured creditors. Noting that the plaintiff had satisfied his liability under the shareholders' assessment statute, the court held that, *qua* creditor to the extent of his

* The brief *per curiam* opinion of this Court dismissing the appeal in *Salter* v. *Williams* indicates that the reason for dismissal was that *certiorari*, rather than appeal, was the proper mode of review.

judgment, the plaintiff was entitled to parity with other creditors (p. 130):

> "That Salter could have enforced a right of rescission against the bank (if such he had) before the appointment of a receiver is unquestioned. If so, it would be only because the rights of creditors were then no greater than his right of rescission. If creditors' rights in the capital were no greater than Salter's before the appointment of a receiver, they surely are no greater after. The rights of both with respect to capital are fixed by law, not by a change from solvency to insolvency of the bank, and by the consequent appointment of a receiver.
>
> *"Salter's right to rescission was fixed by the fraud of the bank when the fraud was practiced. That was before receivership. He therefore approaches the receiver like an ordinary creditor whose claim was contracted before receivership, with a like right to redress out of the bank's funds in the hands of the receiver."* (Italics ours.)

The court's discussion of the effect of the shareholders' liability statute is especially noteworthy, as it acutely refutes the reasoning of Judge Swan below (pp. 129-30):

> "* * * It [the receiver's contention] is based upon the theory that the stock of a bank represents its capital; that creditors have a right to look to its capital for the payment of its debts; that their rights are fixed by the appointment of a receiver, which preserves the capital for them undisturbed by stockholders seeking to get from under the legal liability of their stock ownership. In support of this very general proposition no authorities are cited. The argument in support of it is made by analogy to certain un-

disputed principles affecting the liability of stockholders and the rights of creditors upon insolvency of a national bank and the appointment of a receiver. These apply to the double liability of a stockholder of a national bank under section 5151, R. S., and to the liability of a subscriber to stock in a national bank to complete his contract of subscription. *Scott* v. *Deweese,* 181 U. S. 202, 21 Sup. Ct. 585, 45 L. Ed. 822; *Scott* v. *Abbott,* 160 Fed. 573, 87 C. C. A. 475; *Lyons* v. *Westwater,* 181 Fed. 681, 104 C. C. A. 663; *Westwater* v. *Lyons,* 193 Fed. 817, 113 C. C. A. 617. It is to this double liability of the holder of full-paid shares and to the contractual liability of a subscriber to fully pay for his shares that creditors have a right to look for the payment of the bank's debts. But neither of these principles applies in favor of creditors and against Salter in this case, for Salter has met his liability under section 5151 by paying his assessment and disclaiming an intention to sue for its recovery, and he is not liable for an uncompleted contract of subscription, because the stock he purchased had previously been subscribed and fully paid. It is to that money which shares of stock produce as capital when they are subscribed and paid for that creditors have a right to look, not to the money which Salter thereafter paid the bank in buying its stock. If the purchase price of full-paid stock is treated, not as assets, but as capital, there would be a curious oversubscription of the bank's capital, in which each of Salter's shares would have contributed $300, $100 upon subscription, and $200 upon Salter's later purchase. This, of course, is impossible."

Very recently, the Circuit Court of Appeals for the First Circuit, in *Clark* v. *Boston-Continental National Bank,* 84 F. (2d) 605, and *Same* v. *Same,* 84

F. (2d) 607, both decided June 25, 1936, adhered to the rule laid down in the *Salter* case. Following insolvency of the National Bank and the appointment of a receiver, Clark brought two actions in fraud and deceit against the Bank, charging that the Bank president, acting for the Bank, had made certain false and fraudulent representations as a result of which Clark was induced to purchase Bank stock (and also to lend money upon the security of Bank stock owned by third parties). As in the cause at bar, the purpose of the fraud was to rig the price of Bank stock at an artificialy high level in excess of true value. "Two questions", said the court, "are raised in this case: (1) whether a corporation may be held for the false representations made by its directors or under their authority; and (2) *whether, if it may be held liable therefor, the plaintiffs, as judgment creditors of an insolvent bank, having paid the assessments levied against them as stockholders, may participate ratably with other creditors in a distribution of the assets of the bank in the hands of the receiver.*" The court answered both questions in the affirmative. On the second question, which is exactly the one here in issue, the court stated (p. 607):

> "As to the second question it appears from the allegations of the declaration that the plaintiffs' claims were fixed liabilities of the bank at the time it was declared insolvent, and that the plaintiffs have paid the assessments levied against them as stockholders. In this situation we see no reason why the plaintiffs should not participate ratably with other creditors in the distribution of the bank's assets in the hands of the receiver. It was so held in *Salter* v. *Williams* (C. C. A.) 244 F. 126."

In *Williams* v. *Green*, 23 F. (2d) 796 (C. C. A. 4), the *Salter* case is also approved and followed, the possible distinction between rescission of a subscription to an original issuance of National Bank stock, and rescission of a sale of Bank stock previously issued and paid-up, being carefully suggested.

The Fifth Circuit in *Florida Land & Imp. Co.* v. *Merrill*, 52 Fed. 77; *Merrill* v. *Florida Land & Imp. Co.*, 60 Fed. 17, went so far as to permit the defrauded purchaser of stock to reclaim in specie from the insolvent National Bank the consideration paid (by means of a vendor's lien on land conveyed), thus according with the usual rule that a defrauded party may reclaim the swindled property or fund from all but a *bona fide* purchaser for value without notice, and that a Bank receiver is not, in contemplation of law, a purchaser for value without notice. In short, the plaintiff, although a stockholder, was held entitled, *qua* creditor, to assert normal rights in the latter capacity.

The *Merrill* cases are explained and approved in *Julian* v. *Stewart*, 56 F. (2d) 32 (C. C. A. 5). See also: *Richardson* v. *Olivier*, 105 Fed. 277, 280-1 (C. C. A. 5); *Independent V. & S. Co.* v. *Iowa Mercantile Co.*, 189 Iowa 874; *Litchfield Bank* v. *Peck*, 29 Conn. 384.

The decision of the court below, admittedly in conflict with the *Salter* case, rests on a purported "implication" from the terms of the National Bank shareholders' liability statute (12 U. S. C., Sections 63 and 64). The validity of this implication is treated below, Point III. Judge Swan also cites his own *dictum* in *MacNamee* v. *Bankers' Union*, 25 F. (2d) 614 (C. C. A. 2), which in turn rests on *In re Morris Bros.*,

293 Fed. 294 (C. C. A. 9). The latter is, however, distinguishable on the ground, among others (see Point III), that the opinion speaks indiscriminately of "laches" and depends to some extent on a statute peculiar to Oregon. Judge Swan also cites *William B. Joyce & Co.* v. *Eifert,* 56 Ind. App. 190, which appears to have no bearing on the question of subordination. *Cf. Marion Trust Co.* v. *Blish,* 170 Ind. 686.

The position of the Sixth (see *Cawthon* v. *Bancokentucky Co.,* 52 F. [2d] 850 [D. Ky.]; *In re Recording Devices Co.,* 1 F. [2d] 474 [D. Ohio]) and Eighth Circuits (see *Newton Nat. Bank* v. *Newbegin,* 74 Fed. 135 [C. C. A. 8]; *Lantry* v. *Wallace,* 97 Fed. 865 [C. C. A. 8], *aff'd,* 182 U. S. 536) may fairly be said to be equivocal.

Beyond these authorities, there are several cases in which the question is touched on but not clearly defined. These derive from vague use of the words "laches" and "estoppel". It is of course clear law that a defrauded Bank stockholder (just as any defrauded party) must exercise all reasonable diligence in discovering the fraud and must act with dispatch in rescinding the transaction, else he may be met with the defense of laches or estoppel by ratification. Some opinions, however, placing an unnatural meaning on this doctrine, speak of the incurring by the Bank of liabilities following the fraudulent sale, as in itself a ground of laches or estoppel. See, *e. g., Newton Nat. Bank* v. *Newbegin,* 74 Fed. 135, 140 (C. C. A. 8), *supra,* and cases citing this case. This is not made the sole ground of decision; but the language is on the books and bedevils thought on the question. If the language were taken literally it might result in depriving the defrauded stockholder of any judgment whatever, in cases where debts were

incurred by the Bank after the sale and before insolvency. It might, on the other hand, result in subordinating the judgment only to those claims which arose during that period. *Cf. Burningham* v. *Burke*, 67 Utah 90. The court below took a third tack, subordinating the judgment to the claims of *all* who were creditors at the date of insolvency.

In this condition of the authorities, it seems appropriate and necessary that this Court assume jurisdiction and render a decision herein settling the question.

POINT II.

The court below has decided an important question of Federal law which has not been, but should be, settled by this Court. The question was, indeed, expressly reserved by this Court in a leading case interpreting and applying the Federal shareholders' liability statute.

In the course of its opinion in *Lantry* v. *Wallace*, 182 U. S. 536, relating to the claimed right of a defrauded shareholder, who had not rescinded the purchase of stock at the time of the Bank's insolvency, to escape payment of an assessment, this Court adverted to and reserved the question now at bar. Assuming *arguendo* that the shareholder could recover a judgment for the fraud, the Court left open for future decision whether such a judgment would rank equally with the claims of other creditors (particularly in the proceeds of the stock assessment). Said this Court (p. 555):

> "* * * Whether, if the defendant [shareholder] claimed a judgment against the bank or its of-

ficers for the alleged fraud or deceit of the latter officers, he could participate in the distribution of the proceeds of the stock assessment until all the contract obligations of the bank had been met, was not decided by the Circuit Court of Appeals. That question was wisely reserved for decision when it should arise and become necessary to be decided. * * *"

The question thus reserved is an important one (see 182 U. S., at p. 547). The cause at bar furnishes the occasion for a clear and authoritative decision thereof.

The problem appears to have given rise to considerable doubt in the receivership of the respondent Bank (see, *e. g.*, *Singleton* v. *Harriman Nat. Bank*, 152 Misc. 323, *aff'd*, 241 N. Y. App. Div. 857; *Jaskow* v. *Same*, 159 Misc. 39; *Goess* v. *Ehret*, 85 F. [2d] 109 [C. C. A. 2]; *cf. Goess* v. *A. D. H. Holding Corp.*, 85 F. [2d] 72 [C. C. A. 2]), and is doubtless significant in the administration of National Bank and other receiverships generally.

POINT III.

The decision below has construed the Federal statute as to National Bank shareholders' liability in a way probably untenable.

The opinion below purports to rest on 12 U. S. C., Section 63 (and Section 64). All this statute says is that National Bank shareholders shall be held responsible "for all contracts, debts, and engagements" of the Bank, "each to the amount of his stock therein, at the par value thereof in addition to the amount

invested in such stock". The court below held that "by necessary implication" the statute subordinates a claim for fraud as to the sale of stock, asserted through rescission after insolvency of the Bank, to other creditors' claims. Surely an extraordinary amount of prestidigitation is necessary in order to draw any such implication from the bare words of the statute.

(A) The court's reasoning is as follows: Under the statute it has been held that a defrauded stockholder may not, through rescission after the Bank's insolvency, escape payment of the assessment (citing cases in which defrauded stockholders were not permitted to defend on the ground of fraud *in suits against them to collect the assessment*); "by necessary implication" the statute renders not only the fund raised by the assessment but also all of the insolvent Bank's assets security for those who were creditors at the time of the Bank's failure; *ergo,* one who is liable as a stockholder for assessment "can neither reduce the amount he has paid as assessment nor come in to share assets he is bound to leave to the prior satisfaction of those creditors".

As to the liability of a defrauded stockholder for the assessment, the court is plainly correct. That result follows from the terms of the statute: "stockholder" means stockholder at the date of insolvency (see Section 64); at least where the fraud does not render the sale void but merely voidable, the stockholder *is* such when the Bank fails and is therefore obliged to make good the assessment. See *Ryan* v. *Mt. Vernon Nat. Bank,* 224 Fed. 429, 430 (C. C. A. 2); *B. V. Emery & Co.* v. *Wilkinson,* 72 F. (2d) 10, 13 (C. C. A. 10). But these cases are wholly inapplicable here, since the petitioner has in fact paid

the assessment levied against him and has never disputed that liability.*

The crux of the court's reasoning, however, is that "by necessary implication" both the fund raised by assessment and all the assets of the Bank at the date of insolvency are "security for the payment of *those who were creditors at the time of the bank's failure.*" As a general proposition (although certainly not as an implication from the statute) this may be conceded; the trouble is that the words "creditors at the time of the bank's failure" conceal an ambiguity. *Why is not a defrauded stockholder a "creditor at the time of the bank's failure" to the extent of the fraud?* It is agreed that if the subject matter of the fraudulent sale was not stock, but some other chattel, the fraud-claimant would be entitled to share *pari passu* in the assets of the receivership even if he asserted his claim through rescission after insolvency of the Bank. See *Scott* v. *Armstrong,* 146 U. S. 499, 507. *And it would make no difference that the claimant happened also to be a stockholder.* As was said in *Richardson* v. *Olivier,* 105 Fed. 277, 280 (C. C. A. 5): "The shareholder who is a creditor occupies a dual relation to the bank, and his liabilities and duties in one relation should not embarrass him in the enforcement of his rights in the other." See also: *Duffy* v. *Treide,* 75 F. (2d) 17 (C. C. A. 4); *Bryan* v. *Welch,* 74 F. (2d) 964, 970-1 (C. C. A. 10), *cert. den.,* 295 U. S. 748. On principle, the case is not altered simply because the subject matter of the

* The inapplicability of these cases is graphically shown by the fact that the stockholder in *Salter* v. *Williams,* 244 Fed. 126 (C. C. A. 3), *supra,* had previously sought to enjoin a suit against him to enforce the stock assessment; the court dismissed his bill. *Salter* v. *Williams,* 219 Fed. 1017 (D. N. J.). Having paid the assessment, he rescinded the sale and, as we have seen, was held entitled to share ratably with other creditors to the extent of his judgment for the fraud.

fraudulent sale was Bank stock; as stockholder the petitioner must pay an assessment, because the statute says so; as creditor in virtue of the fraud practiced upon him, the petitioner is entitled to all the rights of an unsecured creditor, and the statute says nothing to the contrary. Further discussion of this point would be supererogative in view of the trenchant observations of Judge Woolley in *Salter* v. *Williams*, 244 Fed. 126 (C. C. A. 3), *supra*, quoted at page 15, *supra*.

It appears, therefore, that far from being a "necessary implication" from the terms of the statute, the decision herein represents a wholly unwarranted inference therefrom. If allowed to stand, the decision will tend to impose a curious additional disability on stockholders of National Banks which the Congress nowhere directed to be imposed. As it has been repeatedly recognized that the liability of 12 U. S. C., Sections 63 and 64, is purely a statutory liability (*Page* v. *Jones*, 7 F. [2d] 541, 544 [C. C. A. 8]), something more than a vague solicitude for creditors-who-are-not-also-stockholders (as distinguished from creditors-who-happen-also-to-be-stockholders) is needed before a disability is imposed beyond the plain terms of those Sections.*

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* The court below was compelled to rest heavily on a supposed implication from these Sections apparently because no clear support can be found for its decision at common law. The *MacNamee* case (25 F. [2d] 614 [C. C. A. 2]), cited by the court, does not involve a National Bank, but it is at best a *dictum* pronounced by the same court. *William B. Joyce & Co.* v. *Eifert*, 56 Ind. App. 190, also cited, does not involve a National Bank, but is by not means persuasive for the decision herein. See, *contra* the *dictum* of the *MacNamee* case, at common law: *Independent V. & S. Co.* v. *Iowa Mercantile Co.*, 189 Iowa 874; *Litchfield Bank* v. *Peck*, 29 Conn. 384. The question has several times been adverted to and reserved at common law. *Hunsicker* v. *Gilham*, 163 La. 651; *Atwood* v. *McKenzie-Waterhouse Co.*, 120 Wash. 214, *cf. Goodin* v. *Palace Store Co.*, 164 Wash. 625, *Chandler* v. *Miller*, 172 Wash. 252; *Dox* v. *R. E. Lomax Co.*, 29 Cal. App. 718; *Stone* v. *Walker*, 201 Ala. 130.

(B) The court ignored a vital distinction, namely, the distinction between a claim for fraud arising from an *original subscription* to National Bank stock, and a claim for fraud arising from a *resale of previously issued and paid-in* Bank stock (as here).

It may be said that parties who do business with a National Bank are justified in relying on two things: (1) that the stock list represents paid-in shares, constituting the initial capital of the Bank; (2) that each such paid-in share is liable for assessment. The effect of allowing the petitioner herein to share equally with other creditors in the assets of the Bank cannot defeat either of these expectations. As to the second —liability for assessment—the petitioner has actually made good. As to the first, the shares were fully paid-in long before the controversy arose.

There might conceivably be colorable ground for the lower court's decision if the rescinded contract herein was an original subscription to Bank stock, since in that event the effect of permitting the petitioner to share equally would, arguably, be a diminution of the initial capital as against other creditors. Even so, the effect would be remote and certainly not interdicted by 12 U. S. C., Sections 63 and 64. But that argument is unavailable where, as here, the fraud related to a sale of stock previously issued and paid-in. This point is admirably presented in *Salter* v. *Williams*, 244 Fed. 126 (C. C. A. 3), *supra*:

> "It is to this double liability of the holder of full-paid shares and to the contractual liability of a subscriber to fully pay for his shares that creditors have a right to look for the payment of the bank's debts. But neither of these principles applies in favor of creditors and against Salter in this case, for Salter has met

his liability under section 5151 by paying his assessment and disclaiming an intention to sue for its recovery, and he is not liable for an uncompleted contract of subscription, because the stock he purchased had previously been subscribed and fully paid. It is to that money which shares of stock produce as capital when they are subscribed and paid for that creditors have a right to look, not to the money which Salter thereafter paid the bank in buying its stock. If the purchase price of full-paid stock is treated, not as assets, but as capital, there would be a curious oversubscription of the bank's capital, in which each of Salter's shares would have contributed $300, $100 upon subscription, and $200 upon Salter's later purchase. This, of course, is impossible."

The distinction between a fraud claim arising from an original subscription, and a fraud claim arising from subsequent resale of paid-in shares, is also observed in *Williams* v. *Green,* 23 F. (2d) 796 (C. C. A. 4), *supra; Julian* v. *Stewart,* 56 F. (2d) 32 (C. C. A. 5), *supra; cf. Litchfield Bank* v. *Peck,* 29 Conn. 384 387, *supra.*

It is interesting to note that the case relied on in the court's opinion (*MacNamee* v. *Bankers' Union,* 25 F. (2d) 614 [C. C. A. 2], *supra,* which rests on a similar case, *In re Morris Bros.,* 293 Fed. 294 [C. C. A. 9], *supra*), is an instance of fraud inducing an original subscription. On close analysis it lends no support to the decision herein.

Indeed, not only were the shares sold to the petitioner previously issued and fully paid-in, but, on respondents' own view of the facts, *they were owned and held by a third party (the securities affiliate)*

prior to the sale, the Bank acting merely as an agent or "broker" in the sale. So far as the Bank and its creditors are concerned, the case is the same as if a bond or some other chattel, owned by a third party, was fraudulently sold by the Bank as agent. There is no more ground for depriving petitioner of equal treatment herein than there would be if the claim arose out of a tort wholly unrelated to Bank stock.

CONCLUSION.

For the foregoing reasons your petitioner, by his solicitor, respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to the end that the cause may be reviewed and determined by this Court and the judgment of the Circuit Court of Appeals modified.

EDWARD S. GREENBAUM,
Solicitor for Petitioner, Henry E. Oppenheimer.

JAN 23 1937
CHARLES ELMORE CRO

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 670

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK,

Petitioner,

—against—

HENRY E. OPPENHEIMER,

Respondent.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MARTIN CONBOY,
Counsel for Petitioner.

GEORGE P. BARSE,
JOHN F. ANDERSON,
Attorneys for the Comptroller of the Currency,
Of Counsel.

THE COURT PRESS, N. Y. C.

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III—The decision sought to be reviewed is erroneous because it imposes liability upon a national bank for the fraud of its officers in connection with the sale of shares of its corporate stock which said shares were not sold from among its assets but were the property of another and it was not enriched by the transaction 28

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. .

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK,

Petitioner,

—against—

HENRY E. OPPENHEIMER,

Respondent.

Cross-Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support thereof.

To the Honorable, the Chief Justice of the United States and the Associate Justices:

Your petitioner, The Harriman National Bank and Trust Company of the City of New York, a national banking association, now in receivership, by direction of the Comptroller of the Currency, respectfully prays that a writ of certiorari issue to review a resettled judgment of the United States Circuit Court of Appeals for the Second Circuit entered on November 9, 1936 in so far as the same reverses the judgment of the District Court in favor of petitioner and orders the entry of final judgment against petitioner for the amount demanded in the respondent's complaint (R. 178).*

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* All references are to pages of the record.

The respondent also has petitioned this Court for a review and modification of the said judgment of the Circuit Court of Appeals. Petitioner has not submitted any brief in opposition to that application for the reason that the considerations set forth in this cross-petition and brief establish that the respondent (petitioner upon that application) is not entitled to any relief.

I.

Summary Statement of the Matter Involved.

Action at law by respondent, as plaintiff, against the petitioner and Henry E. Cooper, conservator of petitioner, defendants.

Respondent on November 1, 1930 purchased 10 shares of petitioner's capital stock and received a certificate for the shares (R. 4-5).

The stock sold to respondent was not petitioner's property but the property of its affiliate, The Harriman Securities Corporation, and the proceeds of the sale, less $100 commission, were credited to the Securities Corporation on petitioner's books (R. 45-7, 63, 158-160).

Respondent sold 2 shares of the stock in May 1932 (R. 23). He received three dividends paid respectively in January and July, 1931 and January, 1932 (R. 23).

On March 3, 1933, petitioner was closed by reason of the bank holiday and never reopened. It was then insolvent (R. 47). A conservator was appointed on March 13, 1933 and a receiver in November 1933* (R. 54).

---

* The correct date of the receiver's appointment is October 16, 1933.

In May 1933, two months after the bank was closed and two and one-half years after respondent had acquired the stock, he read in a newspaper that an action had been brought by another stockholder charging fraud in the sale of shares of petitioner's stock (R. 26-27). Thereupon respondent tendered to the conservator the 8 shares of stock then owned by him and demanded payment of the purchase price (R. 29, 72). The conservator rejected the demand and the present action was begun on May 31, 1933 (R. 1).

The trial was had before a judge and jury. It was established that the shares which had been purchased by the respondent on the inducement of misrepresentations as to the value of the shares (R. 17-19) were not petitioner's property and that petitioner was not enriched by reason of the sale (R. 45-7).

When both sides rested, each moved for the direction of a verdict and the trial judge, to whom the determination of the facts was thus submitted by both parties, found that petitioner was not enriched by the sale of the stock to respondent and that the officers who dealt with respondent had no actual or apparent authority to make the representations in connection with the sale of the stock (R. 63).

Accordingly, he directed a verdict in favor of petitioner and its co-defendant. The respondent did not move to go to the jury on any question of fact (R. 63). Judgment was entered on the directed verdict (R. 12-3) and respondent appealed (R. 150-4).

The Circuit Court of Appeals, although apparently not questioning the finding that there had been no enrichment of petitioner, held that petitioner's officers who had made the fraudulent representations were clothed with actual or apparent authority so as to bind petitioner by their representations.

The Circuit Court of Appeals approved the rescission by respondent of the sale of the shares, thereby in effect requiring that the petitioner accept shares of its stock which it had never owned, and adjudged that respondent is entitled to recover the amount demanded in the complaint.

As petitioner did not attempt to rescind until May, 1933, after the bank had become insolvent and its doors were closed, the Circuit Court of Appeals held that he could not at that time "change his status from that of shareholder to that of creditor to the detriment of general creditors" (R. 161).

The result was that although the Circuit Court of Appeals held that "rescission should be allowed as against the corporation", it ruled that the judgment to be entered should "give the plaintiff no claim entitled to share in the assets of the receivership until after payment of all who were creditors when the bank became insolvent" (R. 162).

Accordingly, the judgment of the District Court was reversed and the order for mandate directed "that judgment for the amount demanded in the complaint be entered against the defendant, The Harriman Bank and Trust Company of the City of New York, collectible out of the assets of the receivership after payment in full of all who were creditors when the said bank became insolvent" (R. 178-9).

The Circuit Court of Appeals dismissed the action as to the conservator because a receiver for the bank had been appointed during the pendency of the action (R. 178).

II.

The Reasons Relied on for the Allowance of the Writ.

Petitioner believes that the writ of certiorari should be granted because:

(A) The Circuit Court of Appeals has directed that a claim founded upon the fraud of national bank officers in procuring the person defrauded to purchase shares of the bank's stock shall participate in the distribution of the proceeds of the stock assessment.

The question of the propriety of permitting qualified participation of such a claim in the proceeds of a stock assessment was reserved by this Court in *Lantry* v. *Wallace,* 182 U. S. 536. Doubt was cast upon the right to such qualified participation by the Circuit Court of Appeals in that case as follows: "It is questionable, to say the least, whether a judgment recovered against the bank for the alleged fraud and deceit could be permitted to participate in the distribution of the fund created by the stock assessment until all contract obligations of the bank had been fully paid", etc. (*Lantry* v. *Wallace,* 97 F. 865, at p. 870), but the question was not resolved because the cross demand for such participation could not be entertained in the action there involved.

The Circuit Court of Appeals has, therefore, decided an important question of Federal law in a way probably untenable and in conflict with the weight of authority, which question has not been, but should be, settled by this Court.

(B) The Circuit Court of Appeals by its judgment has directed petitioner to accept the ownership of certain shares of its stock which were not its property and thereby has compelled, in effect, a reduction of its outstanding capital stock. Since this ruling is applicable to going banks, it is of great importance to the proper administration of such institutions. The Circuit Court of Appeals has, therefore, decided an important question of Federal law which has not been, but should be, settled by this Court. In principle, the decision seems to be in conflict with the decision of this Court in *Awotin* v. *Atlas Exchange Nat. Bank*, 295 U. S. 209.

(C) The Circuit Court of Appeals, by the terms of its reversal of the judgment entered upon the verdict directed by the District Court, has held petitioner liable for the fraud of its officers in connection with the sale of shares of its corporate stock not among its assets but the property of another although it received no benefit from the transaction. In so holding, the Circuit Court of Appeals has proceeded upon the assumption that the officers of a national bank may impose liability upon it to a person purchasing shares of its stock though dealing in its stock is directly prohibited by specific provision of the National Banking Act. The Circuit Court of Appeals has, therefore, decided an important question of Federal law which has not been, but should be, settled by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and all proceedings

had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of said Court, reversing the judgment of the District Court, may be reversed, and that the petitioner be granted such other and further relief as may be meet and just.

Dated, New York, January 18, 1937.

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK,
By MARTIN CONBOY,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion in the Court Below.

The District Court filed no opinion. The grounds of its decision, stated orally from the bench at the close of the trial, appear at page 63 of the record.

The opinion of the Circuit Court of Appeals, reversing the judgment of the District Court, is reported in 85 F. (2d) 582, and appears in the record at pages 157-162.

Jurisdiction.

The judgment which is sought to be reviewed was entered November 9, 1936 (R. 178-9).

Jurisdiction to review this cause by writ of certiorari is conferred upon this court by section 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (Title 28 U. S. C. §347 [a]).

Statement of the Case.

A statement of the case is set forth in the foregoing petition (pp. 2-4, *supra*).

Specification of Errors Intended to be Urged.

The Circuit Court of Appeals erred in the following respects:

1. In holding that a claim founded upon the fraud of national bank officers in procuring the person defrauded to purchase shares of the bank's stock shall participate in the distribution of the proceeds

of the stock assessment collected under the provisions of 12 U. S. C. Section 64 (Federal Reserve Act of December 23, 1913, Section 23 [38 Stat. 273]).

2. In holding that a national bank can be compelled to take and pay for and thereby acquire shares of its own capital stock in a manner unauthorized by Title 12, U. S. C. Section 83 (R. S. Section 5201) by invoking against the bank a right to rescind purchase of such shares from another than the bank through the fraud of the bank officers.

3. In holding that a national bank may be made liable for the fraud of its officers in connection with the sale of shares of its corporate stock which said shares were not sold from among its assets but were the property of another and the bank was not enriched by the transaction.

4. In holding that respondent is entitled to any recovery against petitioner.

Summary of Argument.

I.

The decision sought to be reviewed is erroneous because it directs that a claim founded upon the fraud of national bank officers in inducing the person defrauded to purchase shares of the bank's stock shall participate in the proceeds of an assessment collected from the other shareholders.

II.

The decision sought to be reviewed is erroneous because it compels petitioner, a national bank, to acquire and to pay for shares of its own capital stock in a manner unauthorized by Title 12, U. S. C., Section 83 (R. S. Section 5201), the only provision of law under which a national bank may acquire and hold shares of its own stock.

III.

The decision sought to be reviewed is erroneous because it imposes liability upon a national bank for the fraud of its officers in connection with the sale of shares of its corporate stock which said shares were not sold from among its assets but were the property of another and it was not enriched by the transaction.

Argument.

I.

The decision sought to be reviewed is erroneous because it directs that a claim founded upon the fraud of national bank officers in inducing the person defrauded to purchase shares of the bank's stock shall participate in the proceeds of an assessment collected from the other shareholders.

Petitioner is not a going bank. It is in receivership and has, since March 3, 1933, been insolvent (R. 47). The Comptroller of the Currency has levied an assessment against the stockholders in the full amount provided for by Title 12 U. S. C., Section 64 (R. 53). That section is as follows:

> "§64. *Individual liability of shareholder; transfer of shares.* The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obliga-

tions, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure (Dec. 23, 1913, c. 6, §23, 38 Stat. 273)."

The liability of the stockholders defined by the above section exists by virtue of the statute.

U. S. v. *Knox,* 102 U. S. 422.

Whenever a receiver appointed by the Comptroller of the Currency enforces as provided for in Title 12 U. S. C., Sections 191 and 192,* the personal liability of a shareholder of a national bank under Title 12 U. S. C., Section 64, he does not do so in the right of the bank.

Therefore, when the receiver sues to recover the assessment the shareholder may not offset against the assessment a claim that he had been defrauded by the bank in the acquisition of the stock. He may not thereby escape payment of the assessment that is made to meet the deficiency of assets.

Scott v. *Deweese,* 181 U. S. 202, 213;
Lantry v. *Wallace,* 182 U. S. 536, 549.

Consequently, when the defrauded stockholder seeks to obtain damages or restitution from the contributions of his fellow stockholders, something more is involved than the mere question whether he has been defrauded by the act of the corporation. The important question that is presented is whether he

* Set forth in full in Appendices A and B hereto, pages 33-34.

can, under the statute (12 U. S. C. §64), recover for such fraud from his innocent fellow shareholders.

The question has not yet been passed upon by this Court but it has been by the House of Lords. The Companies Act, 1862 (25 and 26 Victoria p. 614), contained a provision, Section 38, that made every present and past member of a company formed under the act liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities. The City of Glasgow Bank was incorporated under the Companies Act, 1862. One Houldsworth purchased £4,000 of the bank stock from the bank itself in February, 1877 at the price of £9,000. He was registered and received dividends. The bank went into liquidation in October, 1878, with immense liabilities and Houldsworth, as did the respondent in the case at bar, paid an assessment. He brought an action against the liquidators (corresponding to the receiver under our system) to recover damages in respect of the sum he had paid for the stock, in respect of the first call and in respect of the estimated future calls. He founded his claim upon the ground of fraudulent misrepresentations made by the directors and other bank officials to him. The Court of Session in Scotland dismissed his action. He appealed to the House of Lords. The following are from the opinions of the Law Peers:

> "Such an action of damages as the present is really not against the corporation as an aggregate body, but is against all the members of it except one, viz., the Pursuer; it is to throw upon them the Pursuer's share of the corporate debts and liabilities. Many of those shareholders (as was observed by Lord *Cranworth* in *Addie's Case* [L. R. 1 H. L., Sc. 145]) may have come and probably

did come into the company after the Pursuer had acquired his shares. They are all as innocent of the fraud as the Pursuer himself; if it were imputable to them it must, on the same principle, be imputable to Pursuer himself as long as he remains a shareholder; and they are no more liable for any consequences of fraudulent or other wrongful acts of the company's agent than he is. Rescission of the contract in such a case is the only remedy for which there is any precedent, and it is in my opinion the only way in which the company could justly be made answerable for a fraud of this kind. But for rescission the Appellant is confessedly too late."

Lord Selborne in *Houldsworth* v. *City of Glasgow Bank and Liquidators*, 5 App. Cas. 317, 329-30.

The very relief granted to the respondent in the instant case by the Circuit Court of Appeals was suggested in the lower court in the *Houldsworth* case and is thus dealt with by the Lord Chancellor (Earl Cairns):

"It appears to have been contended in the Court below that the Appellant might be unable to maintain the present action as a claim in the liquidation to be satisfied *pari passu* with other creditors, and yet might be able to maintain it as a claim against the company or against shareholders in the company after all other creditors were satisfied. In the argument at your Lordships' Bar I think it was felt to be impossible to maintain this theory of a deferred or secondary right of action against the company. I am satisfied there is no foundation for it. *The Winding-up Act* has no provisions for the payment of claims against the company except the claims of

creditors. Creditors are supposed to be paid *pari passu*, and there is no provision after they are paid for opening up fresh claims by a contributory against the company. There are, indeed, provisions which, after the debts are paid, enable any inequalities in the contributions of the contributories to be set right, but that is quite a different matter."

Houldsworth v. *City of Glasgow Bank and Liquidators*, 5 App. Cas. 317, at page 323.

At the beginning of the Lord Chancellor's opinion, he dealt with the fundamental question whether there could be repudiation of the stock after insolvency:

"It was admitted before your Lordships, as indeed it could not be denied, that after the winding-up of the company commenced it was too late for the Appellant to repudiate his stock, and that he must remain, as the liquidation found him, a partner in the bank and a contributory as such" (*do.*, pp. 322-323).

In the same case, Lord Hatherley expressed views on a situation with which the court was there concerned in all respects analogous to that involved in the instant case as follows:

"In truth the Appellant is trying to reconcile two inconsistent positions, namely, that of shareholder and that of creditor of the whole body of shareholders including himself. As has been observed already by those of your Lordships who have preceded me, amongst the various cases which have been brought before the Courts in respect of dealings with joint stock companies, no case can be adduced in which a person so claiming to be a shareholder has at the same

time successfully asserted his claim against a company in liquidation for such a debt as this, namely one in which he is himself a co-debtor with all his fellow shareholders to himself, and is himself in common with them responsible again to them individually for like liabilities irrespective of representations made by their common agent" (*do.*, pp. 333-4).

The principle stated in the *Houldsworth* case *supra* was applied by Sir George Jessel, Master of the Rolls, in *Re Hull and County Bank, Burgess's Case,* 15 Ch. Div. 507. There, a shareholder of a bank who had been induced by fraudulent misrepresentations contained in the prospectus to apply for shares attempted to rescind his contract and recover the sum paid for the shares after the bank had gone into liquidation. The Master of the Rolls, holding that such a claim might not be successfully asserted, said:

Page 512:

"Now, the other shareholders are as innocent of this fraud as the applicant. There is no pretense for saying that they authorized the committal of it; on the contrary, they themselves were defrauded in like manner. Therefore, they acquired rights as innocent parties under the 38th section which this applicant seeks to take away from them. It is quite true that in *Oakes* v. *Turquand** the only persons whose rights were decided upon were creditors, but the rights of other persons equally innocent were not required to be considered, because there was not enough to pay the creditors.

"In this case, however, it is said that the assets of the company contributed by the other

* L. R. 2 H. L. 325.

shareholders are sufficient to pay the creditors in full and all costs, and, therefore, that, the creditors having been paid or provided for, those rights are not to be considered; but, as I said before, the other contributories are also innocent persons, and have acquired rights, and I see no reason why those rights should not be considered."

The Master of the Rolls said (pp. 513-514):

"Therefore, if you have paid for your shares, and your payment has been applied in the payment of creditors, and the other contributories have not fully paid, they being equally innocent, you would be entitled on that theory to claim back the sum you had paid, and to have it paid you by a call on the other contributories. Of course that would not be enforcing the adjustment of the rights of the contributories amongst themselves, because, as I said before, these other contributories are not the persons who committed the fraud, and they are not liable, and, consequently, if you cannot have total rescission of the contract, it is plain you cannot have partial rescission either, and the claim must wholly fail."

See also:

East Broken Hills Consols., Ltd. v. *Mallaby-Deeley*, 11 T. L. R. 241, aff. id. 245.

In England, therefore, it is well established that after the statutory proceedings for winding up a corporation by reason of corporate insolvency have been commenced, the shareholder may not rescind his subscription on account of fraud. We are now to inquire whether there is anything in Title 12,

U. S. C., Section 64,* providing for assessments on shareholders that justifies the ruling by the Circuit Court of Appeals sought to be reviewed.

The recovery directed in favor of the respondent in the present case will of necessity come out of the assessment contributed by the stockholders of the bank. It cannot come out of the assets of the bank for the bank was concededly insolvent on March 3, 1933 (R. 47), and its assets are, therefore, insufficient to pay its creditors. In substance and effect the decision of the Circuit Court of Appeals makes the stockholders of the bank liable to satisfy respondent's claim out of the assessment which they are required to pay.

No such claim seems to be within the compass of the statute providing for the double liability of stockholders of national banks, and on reason therefore, the instant case should be ruled by the authorities cited.

The language of the statute is as follows:

> "The stockholders * * * shall be held individually responsible for all contracts, debts, and engagements of such association" etc.

Since, as we have seen, the liability of the shareholders is imposed by the statute, anyone asserting a right to share in the proceeds of the assessment must prove that his claim is one for which the shareholders are responsible. Whether the liability imposed on the shareholders be regarded as statutory or contractual, certainly it may not include risks which neither the statute contemplated nor the stockholders have undertaken.

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* Set forth in full, *supra*, pages 11-12.

In *Clinton Mining & Mineral Co.* v. *Beacom,* 266 F. 621 (C. C. A. 3); petition for a writ of certiorari denied, 254 U. S. 637, an action was brought by a judgment creditor of a South Dakota corporation against a stockholder of that corporation to enforce the stockholder's statutory liability for debts of the corporation. It was held that the defendant might go behind the judgment and if it had been obtained on a claim which was not comprised within the statutory liability the judgment creditor could not recover against the stockholder because the latter's liability depended on the nature of the claim against the corporation on which the judgment was founded.

In that case there was no such statutory context as results from the use in Title 12, U. S. C., Section 64, of the word "debts" between "contracts" and "engagements", indicating, under the familiar principle of *noscitur a sociis* that "debts" must be construed as obligations analogous to those arising out of contracts and engagements.

The language of the South Dakota statute was:

> "Each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him."

The judgment creditor who sought to collect the statutory liability from the stockholder had recovered a judgment in an action of tort against the corporation in which the defendant held stock. The Circuit Court of Appeals, in affirming judgment of non-suit, wrote as follows:

> "In legal dictionaries defining the word 'debt' the consensus of definition is to give the technical meaning of certainty of amount as the ear-

mark of a debt, and to contrast its specific promise by contract, with the uncertainty of general words such as 'obligation', 'liability', and the like. But not only does the word 'debt' carry with it the requirement of certainty and the foundation of promise by express contract, but it necessarily implies legality, since the basis of its obligation is legality based on promise and lawful consideration, and hence it will be seen that, a debt being in its nature certain, contractual, and lawfully incurred, it is reasonable that a statute should enact that a stockholder should be held liable for debts a corporation would properly and legally incur. From all of which it would clearly appear that both from the uncertainty and indefiniteness of uncontracted for liability, and from the illegality and wrong from which it arises, that a tort or wrong on the part of a corporation stands in a wholly different relation to a stockholder than does a debt with its certainty of contract and its legality of consideration.

The corporation has no right to commit such tort or wrong. When the stockholder subscribed for its stock, it was not with the purpose of creating an agency that should commit a tort or wrong. Such acts were not incident to purposes for which it was formed, nor was the liability for such wrong which inured to the one wronged thereby, a right for which the latter bargained in the course of what the corporation was impliedly authorized by the stockholder to do. On the contrary, the wrong done was a wrong illegally done by the corporation, not only to the third party, but a wrong done equally and illegally to its stockholder. Such being the case, he who would make the word 'debt' in this statute a synonym for tort, and thereby impose liability on the stockholder, is giving the word 'debt' an

effect which usage does not warrant nor reason justify. We are therefore of opinion that the tort of which the milling company was guilty in unlawfully mining the plaintiff's ore, was not a debt of the tort-feasor corporation, for which its stockholders were made personally liable by this statute."

Clinton Mining & Mineral Co. v. *Beachom,* 266 F. 621, 623.

It is petitioner's respectful submission that a claim founded upon the fraud of national bank officers in inducing the person defrauded to purchase shares of the bank's stock does not come within "contracts, debts, and engagements" within the meaning of Title 12, U. S. C. Section 64, and that it was error, therefore, for the Circuit Court of Appeals to order that such claim should participate in the proceeds of an assessment collected from the shareholders.

II.

The decision sought to be reviewed is erroneous because it compels petitioner, a national bank, to acquire and to pay for shares of its own capital stock in a manner unauthorized by Title 12, U. S. C., Section 83 (R. S. Section 5201), the only provision of law under which a national bank may acquire and hold shares of its own stock.

A national bank cannot purchase its own stock except to prevent loss previously contracted.

"Section 83. *Loans on or purchase by bank of own stock.* No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of

any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section 192 of this title."

12 U. S. C. Section 83 (R. S. §5201).

By the decision sought to be reviewed, the sale of shares of stock not owned by petitioner is rescinded as against petitioner, thereby making petitioner the owner of the stock.

The judgment sought to be reviewed, therefore, presents an important question of Federal law applicable to all national banks, including going concerns (R. 161).

The decision of the Circuit Court of Appeals creates an equivocal situation with respect to the capital stock of a national bank in conflict with the object and policy of the section just quoted.

"The object and policy of the statute in prohibiting a bank from purchasing outright its stock is to prevent the reduction of its outstanding stock, and the withdrawal *pro tanto* of its capital. *Bank* v. *Lanier,* 11 Wall. 374, 379."

Wallace v. *Hood,* 89 F. 11, 13.

"The transaction here in question was not a purchase made for the purpose of preventing, or which was necessary to prevent, loss upon a debt previously contracted, but, as set forth, it was a bald purchase by the bank of its own stock for cash, and necessarily involved for the time being

a reduction *pro tanto* of the corporate stock. Even if it were not forbidden by the statute, the transaction would be inconsistent with public policy and with established principles of law."

Burrows v. *Niblack,* 84 F. 111, 113-4 (C. C. A. 7).

Not only is a national bank prohibited from acquiring shares of its own stock except under the conditions defined by 12 U. S. C., Section 83, but it is also prohibited from withdrawing any portion of its capital, as is required by the decision of the Circuit Court of Appeals.

"Section 56. *Prohibition on withdrawal of capital; unearned dividends.* No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn either in the form of dividends or otherwise any portion of its capital * * * but nothing in this section shall prevent the reduction of the capital stock of the association under Section 59 of this Article."

Title 12, U. S. C., Section 56 (R. S. §5204).

The only provision for reduction of capital is as follows:

"Section 59. *Reduction of capital by vote of shareholders.* Any association formed under this chapter may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this chapter to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any reduction be made

until the amount of the proposed reduction has been reported to the Comptroller of the Currency and such reduction has been approved by the said Comptroller of the Currency and no shareholder shall be entitled to any distribution of cash or other assets by reason of any reduction of the common capital of any association unless such distribution shall have been approved by the Comptroller of the Currency and by the affirmative vote of at least two-thirds of the shares of each class of stock outstanding, voting as classes. (R. S. §5143; Dec. 23, 1913, c. 6, §28, 38 Stat. 274; Aug. 23, 1935, c. 614, §334, 49 Stat. 720.)"

Title 12, U. S. C., Section 59.

The purpose intended to be accomplished by the various statutory provisions relating to national banks is that at all times the bank's stock shall be fully paid and that the bank shall have outstanding the amount of its capital stock for the security of its creditors and for the transaction of its business.

"The bank president could not lawfully acquiesce in the attempted rescission. A surrender of the stock by appellee and an acceptance of it by the bank would have constituted an unauthorized reduction in the capital stock of the banking association. The capital stock of a national banking association may be reduced pursuant to Section 59, Title 12, U. S. C. A. and not otherwise."

Schechter v. *Sherwin,* 81 F. (2d) 603, 605 (C. C. A. 7).

See to the same effect:

Helburn Thompson Co. v. *All Americas Mercantile Corporation,* 211 App. Div. (N. Y.) 69.

The provisions of the statutes and the expressions of the court to which attention is directed under this point would seem to justify the following conclusions:

A national bank must have a fixed amount of stock, which must be paid in within six months after commencement of business (12 U. S. C., Sections 51, 51c, 53*). The aggregate of such stock represents the fund to which the creditors may look in the event of insolvency to cover deficiency in assets (*Id.*, Section 54†).

When the stock has been issued, the law contemplates that its quality of being outstanding shall not be affected otherwise than by the reduction to be accomplished under 12 U. S. C. Section 59, except where acquisition of shares is necessary to permit realization upon a debt owing to the bank contracted prior to such acquisition. In the parlance of the examining service, such transactions are known as D. P. C. (debts previously contracted). Even in a case falling within this category, the stock that is temporarily withdrawn must be put out again within six months under penalty of the closing up of the bank.

In this situation, a requirement that the bank shall accept shares of its own stock as the result of invoking the doctrine of rescission would seem to involve consequences neither permitted nor contemplated by the scheme of laws relating to national banks and in apparent violation both of their terms and policy.

Therefore, when demand was made upon the conservator to accept from the respondent, after insolvency of the bank, the shares of a prior owner other

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* Set forth in full in Appendices C, D and E hereto, pages 35-37.

† Set forth in full in Appendix F hereto, pages 37-38.

than the bank and pay the respondent the amount paid by him for such shares, it is manifest that the conservator could not legally comply with such demand, and it seems to be equally manifest that the court cannot compel such compliance.

An attempt to require this bank to take back its own shares was denied in *Goess* v. *Ehret,* 13 F. Supp. 630 (affd. on other grounds 85 F. [2d] 109). The language of the district court is as follows:

> "Defendant purchased 100 shares of the stock of the bank on certain misrepresentations made by Harriman. These shares of stock sold to the defendant were sold out of the Harriman Securities Corporation's Suspense Account. The amount of the price was credited to the Securities Corporation.
>
> "Defendant by way of relief requested that the bank take back the shares of its own stock and pay to the defendant the purchase price of these shares. This relief cannot be granted. *Awotin* v. *Atlas Exchange Nat. Bank,* 295 U. S. 209, 55 S. Ct. 674, 79 L. Ed. 1393.
>
> "The bank was not permitted to sell the stock. If it attempted to do so, the person dealing with it would have no recourse for any loss that might occur. There can be no relief in this case."
>
> *Goess* v. *Ehret,* 13 Fed. Supp. 630.

By this decision the district court assimilated an attempt to compel a national bank to retake its own shares to the effort to compel such a bank to retake securities which it had sold under a contract that violated Title 12, U. S. C. Section 24, Subdivision Seventh, as amended by the Act of February 25, 1927 (44 Stat. 1226, Section 2).*

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* Set forth in full in Appendix G hereto, page 38.

In *Awotin* v. *Atlas Exchange Nat. Bank,* 295 U. S. 209, attempt was made to avoid the definite prohibition contained in the statute by the claim that a quasi-contractual right could be based upon failure of consideration and also upon the theory of law which allows recovery where one party has been unjustly enriched at the expense of another.

Neither theory prevailed in the face of the direct prohibition in the statute itself against the marketing of obligations except "without recourse". There would seem to be little difference in principle between a definite prohibition of that character and that which is implicit in Title 12, U. S. C. Section 83, limiting the instances in which a national bank may acquire its own stock.

In this connection, we may properly quote from the opinion of this Court as follows:

> "National banks are public institutions, and the purpose and effect of the statute is to protect their depositors and stockholders and the public from the hazards of contingent liabilities, attendant upon the assumption by the bank of the risk of loss by its customers, resulting from the permitted dealing in securities by the bank. The prohibition would be nullified and the evil sought to be avoided would persist, if, notwithstanding the illegality of the contract to repurchase, the buyer, upon tender of the bonds, could recover all he had paid for them. Such a construction of the statute is inadmissible."
>
> *Awotin* v. *Atlas Exchange Bank,* 295 U. S. 209, 214.

III.

The decision sought to be reviewed is erroneous because it imposes liability upon a national bank for the fraud of its officers in connection with the sale of shares of its corporate stock which said shares were not sold from among its assets but were the property of another and it was not enriched by the transaction.

In *Jaskow* v. *Harriman Nat. Bank & Trust Company,* 159 Misc. (N. Y.) 39, the plaintiff sued to recover the sum of $3,030 as damages by reason of his purchase of two shares of the stock of The Harriman National Bank and Trust Company (petitioner) from the bank, claiming that such purchase had been induced by false representations made by a vice president of the bank.

The trial judge found that the stock was purchased by the plaintiff in the belief that he was purchasing it from the bank and not from The Harriman Securities Corporation (petitioner's affiliate) and that the stock was purchased in reliance upon false and fraudulent representations made by persons who were officers of the bank and also officers of the affiliate. Verdict was directed in favor of the defendants. The pertinent portions of the opinion of the trial court are as follows:

> "At the time of the transactions in question, it was entirely legal for the affiliate to buy and sell the shares of its affiliated bank but the bank had no authority to engage as principal in the business of buying and selling its own shares, such traffic being prohibited by the National Banking Act (U. S. Code, tit. 12, §83).
>
> "Plaintiff contends that the sale was made by the bank as principal and that the bank received

the proceeds or consideration thereof. On the record before me and within the period during which evidence as to the transactions was received, that is, from January to July, 1931, I reach the conclusion that the plaintiff has failed to sustain the burden of proof to establish that contention. * * *

* * * * * * *

"The purported sale of the stock by the bank and the representations by the persons who were bank officers in respect to the value of its shares were wholly unauthorized, and as against bank depositors and other creditors who concededly had nothing to do with the sale or the fraud in connection therewith, a bank stockholder should not on principle be allowed to recover, unless the consideration of the sale passed to the bank itself. The receipt of the proceeds is the only conceivable ratification of the transaction by the bank and this is the basis on which plaintiff in his bill of particulars sought to establish such ratification.

"It can never be assumed that an officer of a national bank had authority to transact business in which the bank, by its charter (as restricted by the Banking Act), was expressly prohibited from engaging. (*Alexander* v. *Cauldwell,* 83 N. Y. 480, 486.) The prohibitions of the act are primarily for the security of national banking institutions, that is, for the protection of depositors and other creditors; and if the bank has not received the proceeds of the unauthorized transaction the loss should not be inflicted upon it with the consequent impairment of financial responsibility.

"It has been repeatedly held that a national bank, contracting beyond its powers, is not liable for anything beyond what it received. (*Jack-*

man v. *Continental National Bank,* 16 F. (2d) 728; *Merchants Nat. Bank* v. *Boston State Nat. Bank,* 10 Wall. 604, and numerous other cases cited; U. S. Code Ann., tit. 12, Banks and Banking, §24, note 145.) Assuming, therefore, that the bank, acting through its officers, did itself purport to sell the stock (instead of being a conduit through which the company sold it, as I find on this record), the public policy of the National Banking Act, aimed to protect depositors, would forbid recovery by a defrauded purchaser of the stock as against the bank, unless the bank, with the knowledge of the fraud, retained the proceeds of the sale.

* * * * * * *

"Plaintiff has, of course, a good cause of action against the individual officers who perpetrated the fraud, but it is against them as individuals and not as officers of the bank."

Jaskow v. *Harriman Nat. Bank & Trust Co.,* 159 Misc. 39, 40-42.

The foregoing opinion by Justice Dore, now of the Appellate Division, Supreme Court, First Judicial Department, was followed by the district judge in the instant case (R. 63).

The *Jaskow* case was also followed and, it is justifiable to say, upon the same reasoning, although there are no reported opinions in the Supreme Court or Appellate Division, in the case of *Thomas Bradley, appellant,* v. *Harriman National Bank & Trust Company of the City of New York, respondent,* 247 App. Div. 876, where the statement of the nature of the case and the judgment are as follows:

"Action to recover $7,560 as damages for alleged fraud in the sale to plaintiff of five shares

of stock of defendant bank. Judgment dismissing the complaint at the close of case unanimously affirmed, with costs. No opinion. Present—Martin, *P. J.*, McAvoy, O'Malley, Townley and Glennon, *JJ.*"

The case was tried before Wasservogel, *J.* and after affirmance by the Appellate Division, application was made to that court for leave to go to the Court of Appeals and was denied (248 App. Div. 564). Likewise, application to the Court of Appeals for leave to appeal was denied (271 N. Y. 663).

To the same effect:

Heitman v. *Harriman,* 14 F. Supp. 282 (D. C., S. D. N. Y.).

In *Smith* v. *Tracy,* 36 N. Y. 79, an attempt was made to charge the owner of bank stock with liability for the representations of the president of the bank with whom the owner had left the stock for sale. Judgment in favor of the plaintiff was reversed by the Court of Appeals on the ground that the president of the bank had no authority to warrant the stock which his principal empowered him merely to sell, the property, bank stock, being of a description not usually sold with warranty.

See also:

U. S. v. *Bank of Columbus,* 21 How. 356;
Farmers' State Guaranty Bank v. *Cromwell,* 70 Okla. 199, 173 Pac. 826;
Morse on Banks and Banking, 6th Ed., Section 132.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of

its supervisory powers in order that the erroneous rulings made by the Circuit Court of Appeals for the Second Circuit may be corrected and the general questions raised herein with respect to the affairs of national banks may be settled, and that to such an end a writ of certiorari should be granted and this court should review the decision of the Circuit Court of Appeals for the Second Circuit, insofar as the same reverses the judgment of the District Court in favor of the petitioner and orders the entry of final judgment against petitioner for the amount demanded in the respondent's complaint, and finally reverse it.

CONCLUSION.

The prayer of the petitioner, The Harriman National Bank and Trust Company of the City of New York, that a writ of certiorari issue should be granted.

Respectfully submitted,

MARTIN CONBOY,
Counsel for Petitioner.

GEORGE P. BARSE,
JOHN F. ANDERSON,
Attorneys for the Comptroller of the Currency,
Of Counsel.

Appendix A.

Title 12 U. S. C. §191.

"Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192. (June 30, 1876, c. 156, §1, 19 Stat. 63.)"

Appendix B.

Title 12 U. S. C. §192.

"On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a

court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

Provided, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safekeeping and prompt payment of the money so deposited: *Provided,* That no security in the form of deposit of United States bonds, or otherwise, shall be required in the case of such parts of the deposits as are insured under section 264 of this title. Such depository shall pay upon such money interest at such rate as the comptroller may prescribe, not less, however, than 2 per centum per annum upon the average monthly amount of such deposits. (R. S. §5234; May 15, 1916, c. 121, 39 Stat. 121; Aug. 23, 1935, c. 614, §339, 49 Stat. 721.)"

Appendix C.

Title 12 U. S. C. §51.

"After June 16, 1933, no national banking association shall be organized with a less capital than $100,000, except that such associations with a capital of not less than $50,000 may be organized in any place the population of which does not exceed six thousand inhabitants. No such association shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than $200,000, except that in the outlying districts of such a city where the State laws permit the organization of State banks with a capital of $100,000 or less, national banking associations now organized or hereafter organized may, with the approval of the Comptroller of the Currency, have a capital of not less than $100,000. No such association shall hereafter be authorized to commence the business of banking until it shall have a paid-in surplus equal to 20 per centum of its capital: *Provided,* That the Comptroller of the Currency may waive this requirement as to a State bank converting into a national banking association, but each such State bank which is converted into a national banking association shall, before the declaration of a dividend on its shares of common stock, carry not less than one-half part of its net profits of the preceding half year to its surplus fund until it shall have a surplus equal to 20 per centum of its capital: *Provided,* That for the purposes of this section any amounts paid into a fund for the retirement of any preferred stock of any such converted State bank out of its net earnings for such half-year period shall be deemed to be an addition to its surplus fund if, upon the retirement of such preferred stock, the amount so paid into such retirement fund for such period may then properly be carried to surplus. In any such case the con-

verted State bank shall be obligated to transfer to surplus the amount so paid into such retirement fund for such period on account of the preferred stock as such stock is retired. (R. S. §5138; Mar. 14, 1900, c. 41, §10, 31 Stat. 48; Feb. 25, 1927, c. 191, §4, 44 Stat. 1227; June 16, 1933, c. 89, §17 (a), 48 Stat. 185; Aug. 23, 1935, c. 614, §309, 49 Stat. 709.)"

Appendix D.

Title 12 U. S. C. §51c.

"The term 'common stock' as used in sections 51a to 51d of this title means stock of national banking associations other than preferred stock issued under the provisions of sections 51a to 51d of this title. The term 'capital' as used in provisions of law relating to the capital of national banking associations shall mean the amount of unimpaired common stock plus the amount of preferred stock outstanding and unimpaired; and the term 'capital stock', as used in sections 101 and 177 of this title, shall mean only the amount of common stock outstanding. (Mar. 9, 1933, c. 1, §303, 48 Stat. 5.)"

Appendix E.

Title 12 U. S. C. §53.

"At least 50 per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in installments of at least 10 per centum each, on the whole amount of the capital, as frequently as one installment at the end of each succeeding month from the time it shall be authorized by the Comptroller of the

Currency to commence business; and the payment of each installment shall be certified to the comptroller, under oath, by the president or cashier of the association. (R. S. §5140.)"

Appendix F.

Title 12 U. S. C. §54.

"Whenever any shareholder, or his assignee, fails to pay any installment on the stock when the same is required by section 53 of this title to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or, if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be canceled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the re-

quired amount; in default of which a receiver may be appointed, according to the provisions of section 192 of this title, to close up the business of the association. (R. S. §5141.)"

Appendix G.

Title 12 U. S. C. §24.

"Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power——

* * * * * * * *

Seventh: To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title: *Provided,* That the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation, in the form of bonds, notes and or debentures, commonly known as investment securities, under such further definition of the term 'investment securities' as may by regulation be prescribed by the Comptroller of the Currency, * * *. (R. S. §5136, Feb. 25, 1927, c. 191, §2, 44 Stat. 1226.)"

FILED
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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 588

HENRY E. OPPENHEIMER,

Petitioner,

against

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK and HENRY E. COOPER as Conservator of THE HARRIMAN NATIONAL BANK AND TRUST COMPANY,

Respondents.

No. 670

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK,

Petitioner,

against

HENRY E. OPPENHEIMER,

Respondent.

ON WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR HENRY E. OPPENHEIMER, PETITIONER IN NO. 588 AND RESPONDENT IN NO. 670.

EDWARD S. GREENBAUM,
Solicitor for Henry E. Oppenheimer, Petitioner and Respondent.

EDWARD S. GREENBAUM,
THEODORE S. JAFFIN,
BENJAMIN KAPLAN,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1936.

HENRY E. OPPENHEIMER,
Petitioner,
against
THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK and HENRY E. COOPER as Conservator of THE HARRIMAN NATIONAL BANK AND TRUST COMPANY,
Respondents.

No. 588

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK,
Petitioner,
against
HENRY E. OPPENHEIMER,
Respondent.

No. 670

ON WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR HENRY E. OPPENHEIMER, PETITIONER IN NO. 588 AND RESPONDENT IN NO. 670.

Judgment Under Review and Errors Claimed by the Respective Petitioners.

These two cases present for review the resettled judgment of the United States Circuit Court of Appeals for the Second Circuit, entered November 9, 1936 (R. 132-3), in an action at law for damages upon the executed rescission of a fraudulent sale of certain shares of stock, which action was originally entitled "Henry E. Oppenheimer,

Plaintiff, against The Harriman National Bank and Trust Company of the City of New York and Henry E. Cooper as Conservator, *etc.*, Defendants." Said resettled judgment:

(1) reverses a judgment of the District Court for the Southern District of New York in favor of defendants The Harriman National Bank and Trust Company (hereinafter called "the Bank") and its Conservator entered upon an order directing a verdict for the defendants after cross-motions at the trial for a directed verdict;

(2) orders that judgment be entered for the plaintiff Oppenheimer against the defendant Bank (which went into receivership after this action was started)* for the amount demanded in the complaint, *but that the judgment should be "collectible out of the assets of the receivership after payment in full of all who were creditors when the said bank became insolvent"* (R. 132-3).

Plaintiff Oppenheimer, as petitioner in No. 588, contends that the judgment should not have been so subordinated but should have been given equal ranking with other unsecured creditors' claims, and seeks a modification of the resettled judgment of the Circuit Court of Appeals to this effect. The defendant Bank, as petitioner in No. 670, contends that the plaintiff is not entitled to any judgment whatever and seeks to reinstate the judgment of the District Court in favor of the defendant Bank.

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* The action was ordered dismissed as to the defendant Conservator "in as much as it appears that a receiver was appointed for said Bank during the pendency of said action" (R. 132).

Opinions Below.

The District Court stated its reasons for directing a verdict in favor of the defendants (at R. 46) but did not file a formal opinion. The amended opinion of the Circuit Court of Appeals upon reversal (R. 111-116) is reported in 85 F. (2d) 583.

Jurisdiction.

Petition and cross-petition for writs of *certiorari* (Nos. 588 and 670 respectively) were applied for under Section 240(a) of the Judicial Code (28 U. S. C., Section 347[a]) and were granted by this Court on February 8, 1937 (R. 135).

Summary Statement of the Matters Involved.

The action is at law for damages upon an executed rescission of the sale to the plaintiff Oppenheimer of certain shares of stock of the defendant Bank. The complaint (R. 2-5) alleges that the plaintiff was and still is a depositor in the Bank; that as a result of fraudulent representations made by the Bank to the plaintiff as a depositor, he was induced to and did purchase ten shares of Bank stock on November 1, 1930 at a price of $15,120 (the par amount of the stock being $100 each); that the purchase was made in reliance on false representations made by the Bank with intent to deceive the plaintiff, and that as soon as the plaintiff discovered the fraud he elected to and did rescind the transaction, giving notice thereof on May 6, 1933 to both the Bank and its Conservator (who was appointed on March 13, 1933) and tendering back the stock. He sues for the price paid less proper offsets, joining the Bank and

its Conservator as parties defendant. The action was instituted on May 31, 1933 (R. 1). The Comptroller of the Currency did not declare the Bank insolvent or appoint a receiver for the Bank until October 16, 1933 (R. 39; Cross-pet. for cert., p. 2; R. 122-3).

The plaintiff has paid the statutory assessment levied against him as a National Bank stockholder (without prejudice to the present action) and has in no respect challenged that assessment nor sought repayment thereof (R. 39).

The facts proved under the complaint, as well as the defenses interposed by the defendants, are fairly summarized in the following extract from the amended opinion of the Circuit Court of Appeals herein (R. 111-113):

"The plaintiff, Henry E. Oppenheimer, was a depositor in the Harriman National Bank, of which Joseph W. Harriman was president and F. S. Williamson was a vice-president. On October 28, 1930, Williamson called upon Oppenheimer, presenting a letter of introduction on bank stationery signed by Harriman. Relying upon statements made in the letter and oral statements made by Williamson, Oppenheimer was induced to purchase ten shares of stock of the bank at the price of $15,120. On November 1, he received from the bank a bill therefor which he paid by a check drawn upon his account in the bank and payable to its order. Another vice-president of the bank, Mr. Austin, acknowledged receipt of his check and sent him a stock certificate for the purchased shares. His check was marked 'Paid' and the bill was receipted. During 1931 and in January, 1932, Oppenheimer received dividends on the stock aggregating $525. He sold two shares in May, 1932, for the price of $2,408 and thereafter received a new certificate for his remaining eight shares. In the spring of 1933,

when he saw a newspaper reference to the *Singleton* case,* he discovered that the statements which had induced his purchase were false and fraudulent. Thereupon, on May 6, 1933, he gave notice of rescission, tendered back the certificate, and demanded that his account in the bank be credited with the amount of his payment, less the sums received by him as dividends and from his sale of the two shares disposed of. The bank in the meantime had closed its doors and the defendant Cooper had been appointed its conservator. The plaintiff's demand for rescission being rejected, this action was instituted on May 31, 1933. It seeks judgment for $12,187 with interest from November 1, 1930. During pendency of the action, a receiver was appointed for the bank [on October 16, 1933], but he has not become a party to this suit.

"The amended answer of the defendants, besides a general denial, sets up the affirmative defenses of ratification after knowledge of the fraud, and of laches. [*These affirmative defenses were abandoned at the trial.*] At the trial the defendants were allowed further to amend 'tentatively' by setting up that on and after March 4, 1933, the bank was insolvent and that debts incurred since November 1, 1930, cannot be paid out of its assets. The District Court reserved decision on whether this tentative amendment constituted a defense and never formally ruled upon it.

"The defendants' proof tended to show that the stock purchased by Oppenheimer was not owned by the bank but by its affiliate, Harriman Securities Corporation. The bank maintained in its bond department an account known as 'Harriman Securities Corporation Suspense Account,' in

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* [Court's footnote] *Singleton* v. *Harriman National Bank*, 152 Misc. 323, aff'd 241 N. Y. App. Div. 857.

which were reflected purchases and sales of Harriman Bank stock made for the account of said affiliate. To the extent that the account was long of the stock it represented an indebtedness of the affiliate to the bank. Certificates of stock purchased for the suspense account were put in the name of one Kelly, not an employee of the bank, as nominee of the Securities Corporation. The ten shares sold to Oppenheimer stood in Kelly's name, and the suspense account was credited with the sum received by the bank from Oppenheimer, less $100 retained by the bank as its commission on the sale. It is conceded, however, that Oppenheimer had no knowledge of any transactions between the bank and its affiliate and believed that he was dealing with the bank as a principal in his purchase of the stock. It was also conceded that a fraud was practised upon him by Harriman and Williamson,* the dispute as to this being only whether the bank is chargeable with their fraud."

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* The fraud referred to by the court consisted of the following: The market for the Bank stock had been artificially rigged over a considerable period of time by regular purchases of the stock (usually at the close of each business day) by the Bank, which placed the stock so acquired into the "suspense account." For about two years these final bids, which were relayed from over-the-counter dealers to certain dealers' associations and thence to the newspapers, reflected almost exclusively sales by the dealers to the Bank. There was no real market; the public quotations were fictitious; they concealed a continuous and drastic decline in real value.

As part of the scheme it became necessary to unload the stock which had been so acquired. This was done by inducing certain depositors to buy Bank stock by reference to the deceptive public market quotations and by other fraudulent representations. Among other things Williamson referred the plaintiff to the quotations and stated that the stock came "from an estate." He knew that the market was rigged and he knew that the stock did not come from an estate but from the "suspense account."

As stated by the Circuit Court of Appeals, the defendants frankly conceded that a fraud was practiced upon the plaintiff (R. 27). See *infra*, pp. 47-50, for a fuller description of the fraud.

At the conclusion of the evidence both parties moved for a directed verdict. The district judge granted the defendants' motion on the ground (1) that the Bank was not enriched by the sale of the stock to the plaintiff, and (2) that neither Harriman nor Williamson had actual or apparent authority to make the representations which induced his purchase. From the judgment entered pursuant to the directed verdict the plaintiff appealed.

The Circuit Court of Appeals reversed the judgment of the District Court, holding:

> (a) That the stock purchase could be rescinded for fraud antedating the "insolvency" of the Bank although asserted through demand and suit after the "insolvency" of the Bank.
>
> (b) That it was immaterial "whether the bank, as a principal, sold its own stock, or, as an agent, sold stock owned by the Securities Corporation. • • • In either event, the plaintiff dealt only with the bank; he had no knowledge that any third party was involved. If the bank sold stock belonging to its affiliate, as the defendants contend, it sold for an undisclosed principal and was itself a party to the contract. • • • Therefore, whether the stock belonged to the bank or to the Securities Corporation, the fundamental issue is the same, namely, whether the fraudulent representations of Harriman and Williamson are attributable to the bank" (R. 114).
>
> (c) That it was "indubitably plain that these officers had apparent, if not actual, authority to make the sale on behalf of the bank. • • • If this be so, their representations incidental to the sale by the bank (either as principal or agent) are attributable to the bank, since the plaintiff had no notice that the representations were unauthorized" (R. 114, 115).

For these reasons the plaintiff was held entitled to a judgment for the amount demanded in the complaint.

Coming, however, to the precise point under review in No. 588, namely, the question of the ranking of plaintiff's judgment as a claim against the Bank in receivership, the court ruled that, as the rescission, effected by demand and tender on May 6, 1933, took place after the Bank became "insolvent," the judgment should be *subordinated to the claims of all who were creditors of the Bank at the time it became "insolvent."* It is noteworthy that "insolvency" was conceded as of March 3, 1933 (R. 34), *i. e.*, it was conceded that the Bank was then unable to meet its obligations as they accrued (R. 38, 122-3); but it was not until October 16, 1933, several months after the present action was instituted, that a receiver was appointed and a formal declaration of insolvency made (R. 39; Cross-pet. for cert., p. 2; R. 122-3).

Thus the court, in an action at law, adopted the unusual procedure of entering a "subordinated" judgment. The court noted that "such a judgment will very likely have only an academic value" (R. 116). And recognizing that its decision was in conflict with clear authority elsewhere, it advanced as a ground to support its decision only an asserted "necessary implication" from the Federal statute as to National Bank shareholders' liability for assessment —12 U. S. C., Section 63 (and 64). But, as above noted, the plaintiff has complied with that statute by actually paying the stock assessment levied against him thereunder, and has in no respect challenged the assessment or sought repayment thereof.

The facts will be treated in greater detail where necessary in the course of this Brief.

Statute Involved.

The court deemed relevant 12 U. S. C., Section 63 (and 64):

> "§63. *Individual liability of shareholders.* The shareholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; • • •"
>
> "§64. *Individual liability of shareholders; transfer of shares.* The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure."

Specification of Error.

Plaintiff contends that his judgment should have been held entitled to rank on a parity with other unsecured creditors' claims.

Outline of Argument.

No. 588

As petitioner in No. 588, plaintiff Oppenheimer, raising no objection to the procedural propriety of a "subordinated" judgment in an action at law, contends that his judgment for the fraud practiced upon him by the Bank is entitled to share equally in the receivership estate with the claims of other unsecured creditors. The effect of such a decision would be merely to undo the fraud. The plaintiff was originally a depositor and was induced by fraud to become a stockholder. In this action he seeks to reinstate his deposit balance in the Bank to the extent of the withdrawal therefrom used to make the stock purchase, which will place him in the same position as his fellow depositors. He does not attempt to assert any preference or priority.

The plaintiff contends that, the stock fraudulently sold having been previously issued and paid-in, and the plaintiff having actually paid the stock assessment levied against him, he has a right to share equally in the receivership estate with other general creditors to the extent of his judgment for the fraud. This contention will be developed below on the alternative assumptions that the Bank was selling stock owned by it, and, *a fortiori*, on defendant's own view of the facts, *i. e.*, that the sale was of stock actually owned by a third party, the Bank acting merely as an agent in the transaction. All Circuit Courts of Appeals, except the court below,* which have faced the precise issue in respect to National Banks, have accorded equal ranking to

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* The Circuit Court of Appeals for the First, Third, Fourth and Fifth Circuits (see *infra*, pp. 13-14, 26-30).

claims such as the present, and these decisions are correct. (Point I.)

All of the foregoing proceeds on the assumption that the plaintiff effected his rescission *following* the "insolvency" of the Bank—it being entirely clear that if the rescission was effected prior thereto the plaintiff would be entitled to share equally. In point of fact, however, the plaintiff rescinded and brought suit several months before the finding and declaration of insolvency by the Comptroller of the Currency which accompanied the appointment of a receiver. It is contended that the date of such official finding and declaration of insolvency is the only material date. (Point II.)

There is special reason for according the plaintiff's judgment equal ranking herein. He is a defrauded *depositor*. The merits of his case are equal to those of other depositors and general creditors. (Point III.)

No. 670.

The defendant Bank, as petitioner in No. 670, has contended that plaintiff is entitled to no judgment whatever upon the alternative grounds that the National Banking Act forbids the application of the fund raised by assessment of stockholders to the payment of non-contract claims (from which it is supposed to follow that there is no source out of which such a claim can be satisfied) (Cross-pet. for cert., pp. 11-21); that the Act forbids rescission of a stock purchase against a National Bank whether solvent or insolvent (*id.*, pp. 21-27); that the Bank's officers did not have authority to effect the sale or make representations in connection therewith and the Bank was not "enriched" by reason of the sale (*id.*, p. 28, ff.). These contentions are answered in Point IV.

POINT I.

Plaintiff's judgment is entitled to share equally in the receivership estate with other unsecured creditors' claims.

The essential facts in this case are: (1) The plaintiff was defrauded into changing his position as a depositor into that of a stockholder to the extent of the withdrawal from his deposit account used to make the stock purchase. (2) The fraud was committed by the Bank through its officers actually or apparently authorized to make the sale (and thus to make representations incidental thereto). (3) The fraud antedated the insolvency of the Bank. (4) The plaintiff acted with diligence in disaffirming the transaction, and laches and estoppel are concededly out of the case (R. 115). (5) The stock sold to the plaintiff was issued and fully paid-in many years before the sale to him. (6) In defendant's own view of the facts, the stock was actually owned by a third party, namely, the Harriman Securities Corporation, prior to the fraudulent sale, having been sold by the Bank as agent for the Securities Corporation. (7) The plaintiff has paid the statutory assessment levied against him in respect of the stock and does not seek recoupment or repayment thereof.

The case at bar is to be sharply distinguished from other somewhat related but distinct and different situations. This is *not* a case in which the plaintiff is seeking, because of the fraud of the Bank, to avoid completing payment on a subscription to an original issue of stock, or to avoid the statutory stock assessment. Nor is he seeking to impress a constructive trust upon the assets of the receivership, or

to establish a preferential claim superior to those of other creditors. He seeks merely to have his claim rank on a parity with the claims of the other depositors.

We shall attempt to show, first, that the plaintiff has a right to share ratably with other unsecured creditors upon the assumption that the fraud arose in connection with the sale by the Bank of stock owned by it (the stock being concededly paid-in stock) (*infra*, A); and, second, that such right exists *a fortiori* in the case where (on the defendant's view of the facts) the Bank made fraudulent representations in selling stock as agent for a third person (*infra*, B).

A. On the assumption that the paid-in stock sold by the Bank was owned by it, plaintiff may, to the extent of his judgment for the fraud, share equally with other unsecured creditors in the receivership estate.

With the exception of the court below, Circuit Courts of Appeals presented with the precise issue at bar have taken the position that a stockholder who is not guilty of laches or other inequitable conduct and has fully paid his stock assessment may, on proof of fraudulent misrepresentations, rescind the sale even after the receivership of the Bank—a proposition also adopted as basic by the court below—and thereupon assert a claim which shall share *pari passu* with those of other unsecured creditors. *Salter* v. *Williams*, 244 Fed. 126 (C. C. A. 3), *app. dism.*, 250 U. S. 653; *Clark* v. *Boston-Continental National Bank*, 84 F. (2d) 605 (C. C. A. 1); *Same* v. *Same*, 84 F. (2d) 607 (C. C. A. 1); *Florida Land & Imp. Co.* v. *Merrill*, 52 Fed. 77 (C. C. A. 5); *Merrill* v. *Florida Land & Imp. Co.*, 60 Fed. 17 (C. C. A. 5). See also, *Williams* v. *Green*, 23 F. (2d) 796 (C. C. A.

4); *Julian* v. *Stewart*, 56 F. (2d) 32 (C. C. A. 5); *Independent Van & Storage Co.* v. *Iowa Mercantile Co.*, 189 Iowa 874. These cases, which will be considered more fully below, stand upon the following analysis: The right to rescind for fraud is fixed by the fraud of the Bank when the fraud was practiced. That antedated the insolvency and the receivership. In the absence of laches or estoppel, the rescinding stockholder, after paying the assessment levied against him, approaches the receivership like any creditor whose claim was contracted before insolvency and before receivership. A right so fixed is not displaced or altered by the appointment of a receiver, who takes *cum onere*. Nor does the stock assessment statute, either expressly or by implication, purport to alter this result. To be sure, it imposes a liability for contribution on each share of stock appearing on the stock list; but the rescinding stockholder (here a defrauded depositor) has honored the statute by actually paying the assessment. So far as the statute may require that all issued stock shall have been fully paid in, that requirement was also satisfied by actual payment. In short, *qua* stockholder appearing on the stock list, the rescinding stockholder must pay the assessment; *qua* creditor to the extent of the fraud, he is entitled to a judgment collectible out of the receivership estate in the same way as any unsecured, general claim.

Despite these decisive authorities and the persuasive reasoning supporting them, and despite the fact that the plaintiff was a defrauded *depositor*, the court below subordinated the plaintiff's judgment. It rested its decision solely upon a "necessary implication" from 12 U. S. C., Section 63 (and 64), the statute as to stockholders' personal liability for assessment.

In order to test the validity of the court's thesis, it is essential to examine into the rights of defrauded stockholders obtaining at common law and then to determine the effect of the assessment statute upon those rights.

(1) *Common law and rationale of plaintiff's position.*

It is conceded that the plaintiff was a depositor of the Bank and was induced by fraudulent representations to use part of his deposit to purchase Bank stock. It is a well established doctrine that a defrauded party, if diligent, may rescind the transaction after the insolvency of the defrauder and establish a claim against its estate. *Cunningham* v. *Brown*, 265 U. S. 1; *In re Weissman*, 19 F. (2d) 769 (C. C. A. 2); *In re Sherman*, 13 F. (2d) 121 (C. C. A. 2); *In re Outdoor Clothing Co.*, 10 F. Supp. 617, *aff'd*, 77 F. (2d) 1009 (C. C. A. 2); *Manly* v. *Ohio Shoe Co.*, 25 F. (2d) 384 (C. C. A. 4); *Jones* v. *H. M. Hobbie Grocery Co.*, 246 Fed. 431 (C. C. A. 5); *Sternberg* v. *American Snuff Co.*, 69 F. (2d) 307 (C. C. A. 8). The fact that a receiver or trustee in bankruptcy has been appointed for the insolvent does not affect this right; such receiver or trustee succeeds to the property of the insolvent subject to all claims that might have been interposed against it. *Scott* v. *Armstrong*, 146 U. S. 499; *In re Sherman, supra; Williams* v. *Green, supra.*

It is equally clear that the circumstance that the defrauded party happens to be a stockholder of the insolvent corporation does not affect his claim as creditor nor subordinate it to those of other creditors. This is unquestionably the case where the claim of the stockholder is based upon a transaction other than the purchase of stock; for example: advances made to the corporation (*Duffy* v.

Treide, 75 F. [2d] 17 [C. C. A. 4]); a debt arising from prior declaration of dividends (*Bryan* v. *Welch*, 74 F. [2d] 964 [C. C. A. 10], *cert. den.*, 295 U. S. 748; 11 FLETCHER, CYCLOPEDIA OF CORPORATIONS, §5324; 2 COOK, CORPORATIONS [8th Ed.], §541); a deposit accepted by a Bank with knowledge of insolvency (*Richardson* v. *Olivier*, 105 Fed. 277 [C. C. A. 5]).

There is no valid reason why a claim for fraud arising from the sale of stock should be treated on any different basis. In the absence of laches or other inequitable conduct—factors which are concededly out of this case—such a claim has been held not to be subordinate to claims of other general creditors. *Salter, Clark, Merrill, Williams, Julian,* and *Independent* cases, cited *supra*, pp. 13-14; see also, *Litchfield Bank* v. *Peck*, 29 Conn. 384.

An authority seemingly opposed to this position and subordinating the claims of defrauded stockholders is *In re Morris Bros.*, 293 Fed. 294 (C. C. A. 9).* While this decision is wholly reconcilable on the grounds (a) that the fraud arose in connection with an original subscription, (b) that the court found the stockholder guilty of "laches" (*id.*, p. 296) and (c) rested to some extent upon a statute peculiar to Oregon (*id.*, p. 297), reference was made to a so-called "trust fund" theory as a reason for subordination. The position taken by the court is that "all the property of an insolvent corporation, and including amounts unpaid on stock subscriptions induced by corpo-

* The court below cited its own *dictum* in *MacNamee* v. *Bankers' Union for Foreign C. & F.*, 25 F. (2d) 614, 617 (C. C. A. 2), which in turn rests on the *Morris* case. The court below also cited *William B. Joyce & Co.* v. *Eifert*, 59 Ind. App. 190, but that case appears to have no bearing on the question of relative ranking of claims as between defrauded stockholders and creditors, since the company had no creditors.

rate fraud, is a trust fund for creditors to the exclusion of stockholders'' and consequently, ''given a corporation insolvent and unpaid subscriptions, corporate fraud inducing the subscriptions affords no stockholder a defense to collection, or ground for rescission, or basis for trust or lien, to the prejudice of corporate creditors. *A fortiori*, nor in respect to stock subscriptions paid.''

Assuming the validity of the so-called ''trust fund'' theory—a doctrine much discredited and qualified in this country—it is manifest that granting the defrauded stockholder a claim, to the extent of the fraud, on a parity with other general claims, does not conflict with that doctrine. The plaintiff herein is not seeking to avoid the collection of, nor to rescind an *original* subscription to capital stock, paid or unpaid (as was attempted in the *Morris* case), which, *arguendo*, would have the effect of reducing the capital fund held in ''trust'' for creditors. The stock has been paid for and the capital of the defendant Bank has been contributed. All plaintiff desires is to establish a claim not superior to but on a par with other claims, —that is, to reinstate his position as a depositor. To the extent that the plaintiff has been defrauded, he occupies the status of a creditor and claimant and he may, consistently with the ''trust fund'' theory, share as a creditor with others in the receivership assets. Indeed he is a member of the very class that the ''trust fund'' doctrine seeks to protect. To deny him this right would necessarily mean that a claimant who happens also to be a stockholder can never share equally, *qua* creditor, in the assets of an insolvent corporation. It is manifest that the ''trust fund'' theory, whatever its essential validity, should not be and has not been extended to such unreasonable limits.

Dicta in a few jurisdictions suggest the thought that the claim of a defrauded stockholder should rank equally with claims which antedated the stock purchase induced by fraud, but should be subordinate to claims and deposits made subsequent to such purchase. The reason advanced for such inferior ranking is that subsequent creditors advance money or make deposits on the strength of and in reliance upon capital contributed through the stock purchase, and should be protected in their reliance. See *Birmingham* v. *Burke*, 67 Utah 90. This reasoning is not persuasive and is thoroughly unrealistic. The existence of such reliance is in fact highly doubtful. Granted there is reliance, what is the justifiable extent thereof? A subsequent creditor may conceivably have a right to rely on the fact that the capital has been or will be contributed; but that reliance is not defeated here, since the capital was in fact contributed when the stock was initially issued and paid in—long before the plaintiff was fraudulently induced to purchase it. Certainly the creditor is not justified in relying upon the assumption that a stockholder does not have an enforceable claim against the corporation; nor can he in good conscience seek to benefit by a fraud practiced upon another creditor (depositor). The defrauded depositor is not attempting to assert a priority as against other creditors; he merely asserts a claim equal in rank to other unsecured claims, and, on the plainest conceptions of fair dealing, is entitled to it.

The defendant Bank has cited three English cases (Cross-pet., p. 13, ff.) as common law support for the extreme position that there is *no* right to rescind a stock purchase for fraud after insolvency of the corporation, even in the absence of laches or estoppel, of which the plaintiff was concededly innocent in this case (R. 115). It

is enough to say that the so-called English rule exemplified by these cases, whatever may be its true limits, has not been followed in this country (see in addition to authorities cited *supra*, cases collected in Notes, 41 A. L. R. 674, 689, ff.; 46 A. L. R. 484; 1936 Supp., p. 294) and the court below has specifically rejected it.* The English rule is dependent upon an historical and statutory background having no parallel in this country.** It is to be noted, moreover, that

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* The court said in *MacNamee* v. *Bankers' Union for Foreign C. & F., supra*, p. 617: "While the rule may be otherwise in England, in this country it is generally held that a defrauded shareholder may rescind after the insolvency of the corporation. *Newton Nat. Bank* v. *Newbegin*, 74 F. 135 (C. C. A. 8), 33 L. R. A. 727; *Florida, etc., Co.* v. *Merrill*, 52 F. 77 (C. C. A. 5); *Salter* v. *Williams*, 244 F. 126 (C. C. A. 3); *Ryan* v. *Mt. Vernon Bank*, 206 F. 452 (C. C. A. 2); *Brown* v. *Allebach* (C. C.) 166 F. 488, 495; *Gress* v. *Knight*, 135 Ga. 60, 68 S. E. 834, 31 L. R. A. (N. S.) 900; *Morrisey* v. *Williams*, 74 W. Va. 636, 82 S. E. 509, L. R. A. 1915D, 792."

** Originally members of English stock companies were jointly and severally liable for all obligations of the company and could be directly proceeded against by creditors. They were virtually partners and were frequently referred to as such. See historical discussion in *Oakes* v. *Turquand*, [1867] L. R. 2 H. L. 325. Accordingly a member could no more rescind his purchase of stock after insolvency and put in a claim on a par with creditors than could a partner, after insolvency of the partnership, put in a claim against the estate on the ground that he had been fraudulently induced to become a partner. By the Companies Act, 1862, a more formal method of "winding-up" stock companies was adopted, the responsibility of members to satisfy company liabilities being made enforceable on behalf of creditors by liquidators' "calls". Moreover the responsibility of members for company liabilities could be limited by appropriate specification in the Memorandum of Association. Companies were thereafter divided into: "unlimited companies"—no limit on members' responsibility for calls; "companies limited by shares"—members' responsibility limited to amounts unpaid on their shares (shares being originally issued at less than par); "companies limited by guarantie"—member's responsibility limited to stated amounts specified in the Memorandum. It was soon held that the Act of 1862, while in some cases limiting the amount of the responsibility of members, did not alter the essential nature of their relations *inter se* or toward creditors.

English cases have not gone to the extent claimed by the defendant. In *East Broken Hills Consols, Ltd.* v. *Mallaby-Deeley*, 11 T. L. R. 241 (Q. B. Div.), *aff'd*, *id.*, p. 465 (Ct. App.), and *In re Hull & County Bank*, 15 Ch. Div. 507, cited by the defendant (Cross-pet., pp. 16-17), the members were attempting to resist payment of a call or the original subscription price in suits therefor brought by the liquidators. See also, *Oakes* v. *Turquand*, [1867] L. R. 2 H. L. 325; *Kent* v. *Freehold Land & Brick-Making Co.*, [1868] L. R. 3 Ch. 493; *Stone* v. *City & County Bank, Ltd.*, [1877] L. R. 3 C. P. Div. 282, 289. In *Houldsworth* v. *City of Glasgow Bank and Liquidators*, 5 App. Cas. 317 (Cross-pet., pp. 13-16), the member was not attempting to rescind but was asserting a claim among other things to be paid in full for calls which he had theretofore paid and anticipated calls. It is to be further observed that the company involved was "unlimited," *i. e.*, members were jointly and severally liable, as partners, for all the liabilities of the company.

In sum, we submit that the prevailing rule permitting the diligent, defrauded stockholder to share equally, to the extent of his judgment for the fraud, in the assets of an insolvent corporation, is founded upon cogent grounds of reason and equity. A claim based upon the corporation's fraud arose at the time of purchase prior to the insolvency; like any other defrauded person, the stockholder is entitled to equal redress. Though a stockholder, the plaintiff was

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Oakes v. *Turquand*, *supra*. They remained "partners," though in a qualified sense, and were said to have no right to rescind after a formal winding-up of the company. But, as noted in the text, English cases have not actually gone to this extreme.

For obvious reasons, American courts have not followed the English decisions. Stockholders in American corporations cannot be regarded as "partners" or joint-venturers.

not engaged in active management or control of the corporation, and any vague solicitude for creditors as opposed to stockholders does not warrant a subordination of plaintiff's claim merely because he happens to be a stockholder as well as a defrauded depositor. The strength of his position is certainly equal to that of other creditors.

(2) *The effect of the statute respecting National Bank shareholders' liability for assessment.*

Impliedly agreeing that there was no basis for its decision at common law or in the reason of the case apart from special statute, the court below rested its decision on a purported "implication" from 12 U. S. C., Section 63 (R. 116). All that this section says is that National Bank stockholders shall be held responsible "for all contracts, debts, and engagements" of the Bank, "to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." This liability, as the defendant concedes (Cross-pet., p. 12), is one which exists by virtue of this section and not otherwise. *Pufahl* v. *Parks*, ... U. S. ....., 81 L. Ed. *73; *Forrest* v. *Jack*, 294 U. S. 158, 162; *Christopher* v. *Norvell*, 201 U. S. 216, 225; *Page* v. *Jones*, 7 F. (2d) 541, 544 (C. C. A. 8). Being in derogation of the common law, the statute will not be construed to alter or affect pre-existing common law rights further than the clear import of the language used in the statute imperatively requires. *Texas & Pacific Railway* v. *Abilene Cotton Co.*, 204 U. S. 426, 437. Where, in the text of the section, or any reasonable implication therefrom, is there justification for the *further* and drastic disability that a claim for fraud as to the sale of stock, asserted through rescission after insolvency of the Bank,

shall be subordinated to other creditors' claims? Surely an extraordinary amount of prestidigitation is necessary in order to draw any such "implication" from the words of the statute.

The fallacy in the court's position is that it has ignored the dual relation which the plaintiff sustains to the Bank—his position as a stockholder whose name appears on the stock list at the time of the Bank's failure, and his position as a creditor of the Bank to the extent of the fraud practiced upon him. Separate and independent rights and obligations flow from each status and "his liabilities and duties in the one relation should not embarrass him in the enforcement of his rights in the other." *Richardson* v. *Olivier, supra*, p. 280. Recognition of this dual rôle played by the plaintiff is crucial to the proper solution of the issue at bar.

The court below cited cases under the statute in which defrauded stockholders who had not rescinded prior to insolvency were held unable to resist suits brought by the receiver to collect the statutory assessment,* and argued from them that a defrauded stockholder cannot "reduce the amount he has paid as assessment" (R. 116). The liability of a defrauded stockholder to meet the assessment is not disputed. That flows from the terms of the statute: "stockholder" means stockholder at the date of receivership (see Section 64); at least where the fraud does not render the sale void, but merely voidable, the stockholder *is* such when the Bank fails and is therefore obliged to make good the assessment. See *Lantry* v. *Wallace*, 182 U. S. 536, 551; *Ryan* v. *Mt. Vernon National Bank*, 224 Fed. 429, 430

* *Scott* v. *Deweese*, 181 U. S. 202; *Anderson* v. *Cronkleton*, 32 F. (2d) 170 (C. C. A. 8); and *Lantry* and *Ryan* cases, *infra*.

(C. C. A. 2); *B. V. Emery & Co.* v. *Wilkinson*, 72 F. (2d) 10, 13 (C. C. A. 10). But these cases are wholly inapplicable here, since the plaintiff has not sought to avoid or to "reduce" the statutory obligation resting upon him as stockholder. To the contrary, he has honored that obligation by paying the full assessment levied against him. Having paid such assessment he is now asserting his independent rights as creditor and may file a claim and receive dividends on his claim. As to his present deposit balance in the Bank, the plaintiff can concededly do this; the only effect of a favorable decision herein will be to permit him to receive dividends on his true deposit balance—*i.e.*, the present balance plus the amount withdrawn from the account as a result of the Bank's fraud.

After reciting the rule that defrauded stockholders must, under the statute, pay the assessment, the lower court stated that by "necessary implication" both the fund raised by the assessment and all the assets of the Bank at the date of insolvency are "security for the payment of *those who were creditors at the time of the bank's failure*" and that the defrauded stockholder cannot "come in to share the assets he is bound to leave to the prior satisfaction of those creditors" (R. 116). But the words "*creditors at the time of the bank's failure*" conceal an essential ambiguity; they point the very error in the court's analysis. Why is not a defrauded shareholder a "creditor at the time of the bank's failure" to the extent of the fraud which antedated the Bank's failure?

There is nothing in the statute that purports to affect or alter the common law rights which a defrauded stockholder has in his separate and independent capacity as creditor. It merely defines the obligations of a stockholder

appearing on the stock list by imposing a liability which does not exist at common law; and to that extent the common law rule is altered. The plaintiff has paid that assessment. In all other respects the rights and legal relations obtaining at common law are left unaffected. As creditor by virtue of the fraud the plaintiff is entitled to the same rights as any other unsecured creditor.

So far as creditors' general reliance on the statute is concerned, it may be said that the statute justifies reliance on the fact that each share on the stock list is liable for assessment. But, as we have seen, the plaintiff has actually paid the stock assessment; and neither creditors nor other shareholders have cause to believe or to rely on the supposition that the plaintiff does not have a valid claim, *qua* creditor, against the receivership. Conceivably also, the statute reenforces the creditors' reliance on the fact that the stock list represents paid-in shares constituting the initial capital of the Bank. But as shown above, since the capital of the Bank was in fact contributed long before the present controversy arose—a point to which the court below did not even advert—no creditor is defeated in this reliance.

Our contention that the plaintiff is both a creditor and stockholder of the Bank and that his rights as creditor are in no way affected or subordinated by the Bank assessment statute, either expressly or by necessary implication, finds support in every other circuit presented with this question. Such decision has been reached in two types of cases: (a) those represented by *Richardson* v. *Olivier*, *supra* (C. C. A. 5), in which the claim of the National Bank stockholder was not based upon fraud inducing the sale of Bank stock, but upon fraud affecting some other trans-

action (or was based upon some other delict or contract obligation); (b) those represented by *Salter* v. *Williams, supra* (C. C. A. 3), which is directly in point, where the claim of the National Bank stockholder was based upon fraud inducing the sale of Bank stock.

Richardson v. *Olivier.*

Olivier, a shareholder in a National Bank, deposited a check with the Bank at a time when the institution was insolvent and known to be so by its officers. After paying the assessment *qua* stockholder, the stockholding-depositor instituted suit against the receiver to recover the proceeds of the check on the ground that the deposit was procured by fraud. One of the defenses interposed by the receiver was that the plaintiff was a stockholder of the Bank. In overruling this contention the court stated (105 Fed., p. 280):

> "The statute fixes certain liabilities on the shareholders of national banks. They are made responsible for the contracts of the bank to the amount of their stock therein at its par value, in addition to the amount invested in such shares. Rev. St. §5151. • • • When a shareholder makes a general deposit in the bank, the bank becomes his debtor, as in the case of deposits by non-shareholders. When he makes a special deposit, the relation of trust arises, as in the case of special deposits by others. There is no sound reason, we think, for refusing to give a shareholder the same remedies against the bank on account of its frauds that are given to other creditors. *The shareholder who is a creditor occupies a dual relation to the bank, and his liabilities and duties in the one relation should not embarrass him in the enforcement of his rights in the other.* • • • To deprive him of the

> rights and remedies of others would be to add to the responsibilities and liabilities imposed on him by the act of Congress under which the banks are organized." (Italics ours.)

See also *Duffy* v. *Treide, supra; Bryan* v. *Welch, supra,* pp. 970, 971.

Salter v. *Williams and like cases.*

In this case the First National Bank of Bayonne by its president had fraudulently induced the sale of its own paid-in stock. After the insolvency of the Bank and the appointment of a receiver plaintiff rescinded the contract and initially sought to avoid the stockholder's assessment imposed by the Comptroller of the Currency. The court properly held that the plaintiff was liable for the assessment within the provisions of the Federal statute (219 Fed. 1017 [D. N. J.]). Thereafter the question arose whether the plaintiff was entitled to a judgment against the Bank deriving from the fraud and whether such judgment could share equally with the claims of other unsecured creditors. The Circuit Court of Appeals for the Third Circuit held that the Bank was chargeable with the fraud of the president and then, noting that the plaintiff had satisfied his liability under the shareholders' assessment statute, held that, *qua* creditor, the plaintiff was entitled to parity with other creditors (244 Fed., p. 130):

> "That Salter could have enforced a right of rescission against the bank (if such he had) before the appointment of a receiver is unquestioned. If so, it would be only because the rights of creditors were then no greater than his right of rescission. If creditors' rights in the capital were no greater than

Salter's before the appointment of a receiver, they surely are no greater after. The rights of both with respect to capital are fixed by law, not by a change from solvency to insolvency of the bank, and by the consequent appointment of a receiver.

"Salter's right to rescission was fixed by the fraud of the bank when the fraud was practiced. That was before receivership. He therefore approaches the receiver like an ordinary creditor whose claim was contracted before receivership, with a like right to redress out of the bank's funds in the hands of the receiver." (Italics ours.)

The court's discussion of the effect of the shareholders' liability statute is especially noteworthy, as it acutely refutes the reasoning of court below (pp. 129-30):

"• • • It [the receiver's contention] is based upon the theory that the stock of a bank represents its capital; that creditors have a right to look to its capital for the payment of its debts; that their rights are fixed by the appointment of a receiver, which preserves the capital for them undisturbed by stockholders seeking to get from under the legal liability of their stock ownership. In support of this very general proposition no authorities are cited. The argument in support of it is made by analogy to certain undisputed principles affecting the liability of stockholders and the rights of creditors upon insolvency of a national bank and the appointment of a receiver. These apply to the double liability of a stockholder of a national bank under section 5151, R. S., and to the liability of a subscriber to stock in a national bank to complete his contract of subscription. *Scott* v. *Deweese*, 181 U. S. 202, 21 Sup. Ct. 585, 45 L. Ed. 822; *Scott* v. *Abbott*, 160 Fed. 573, 87 C. C. A. 475; *Lyons* v. *Westwater*, 181 Fed. 681, 104

C. C. A. 663; *Westwater* v. *Lyons*, 193 Fed. 817, 113 C. C. A. 617. It is to this double liability of the holder of full-paid shares and to the contractual liability of a subscriber to fully pay for his shares that creditors have a right to look for the payment of the bank's debts. But neither of these principles applies in favor of creditors and against Salter in this case, for Salter has met his liability under Section 5151 by paying his assessment and disclaiming an intention to sue for its recovery, and he is not liable for an uncompleted contract of subscription, because the stock he purchased had previously been subscribed and fully paid. It is to that money which shares of stock produce as capital when they are subscribed and paid for that creditors have a right to look, not to the money which Salter thereafter paid the bank in buying its stock. If the purchase price of full-paid stock is treated, not as assets, but as capital, there would be a curious oversubscription of the bank's capital, in which each of Salter's shares would have contributed $300, $100 upon subscription, and $200 upon Salter's later purchase. This, of course, is impossible.'"*

Analysis of the authorities indicates that the First, Fourth and Fifth Circuits have sided with the view of the Circuit Court of Appeals for the Third Circuit as set forth in the *Salter* case, and that there is no decided case to the contrary as respects National Banks (except for the decision herein).

Very recently, the Circuit Court of Appeals for the First Circuit, in *Clark* v. *Boston-Continental National Bank* (two cases), *supra*, both decided June 25, 1936, adhered to the

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* In the case at bar the par amount of the stock was $100 each; the plaintiff paid $1,512 for each share.

rule laid down in the *Salter* case. Following insolvency of the National Bank and the appointment of a receiver, Clark brought two actions in fraud and deceit against the Bank, charging that the Bank president, acting for the Bank, had made certain false and fraudulent representations as a result of which Clark was induced to purchase Bank stock (and also to lend money upon the security of Bank stock owned by third parties). As in the case at bar, the purpose of the fraud was to rig the price of Bank stock at an artificially high level in excess of true value. "Two questions," said the court, "are raised in this case: (1) whether a corporation may be held for the false representations made by its directors or under their authority; and (2) *whether, if it may be held liable therefor, the plaintiffs, as judgment creditors of an insolvent bank, having paid the assessments levied against them as stockholders, may participate ratably with other creditors in a distribution of the assets of the bank in the hands of the receiver.*" (Italics ours.) The court answered both questions in the affirmative. On the second question, which is the one here in issue, the court stated (84 F. [2d], p. 607):

> "As to the second question it appears from the allegations of the declaration that the plaintiffs' claims were fixed liabilities of the bank at the time it was declared insolvent, and that the plaintiffs have paid the assessments levied against them as stockholders. In this situation we see no reason why the plaintiffs should not participate ratably with other creditors in the distribution of the bank's assets in the hands of the receiver. It was so held in *Salter* v. *Williams* (C. C. A.) 244 F. 126."

In *Williams* v. *Green, supra* (C. C. A. 4), the *Salter* case is also approved and followed, the distinction between

rescission of a subscription to an original issuance of National Bank stock, and rescission of a sale of Bank stock previously issued and paid in, being carefully suggested.

The Circuit Court of Appeals for the Fifth Circuit in *Florida Land & Imp. Co.* v. *Merrill,* and *Merrill* v. *Florida Land & Imp. Co., supra,* decided before the *Salter* case, also permitted a defrauded purchaser of issued and paid-in stock to assert the normal rights of a creditor to the extent of the fraud. The *Merrill* cases are explained and approved in *Julian* v. *Stewart, supra* (C. C. A. 5).

It is respectfully submitted that the reasoning of the *Salter* case and cases approving and following it is sound in logic and principle and that the decision herein, far from being a "necessary implication" from the terms of the statute, represents a wholly unwarranted inference therefrom. If allowed to stand, the decision will tend to impose a curious additional disability on stockholders of National Banks which the Congress nowhere directed to be imposed. As it has been repeatedly recognized that the liability of Section 63 is purely a statutory liability (see *supra,* p. 21), something more than a vague and unfounded solicitude for creditors-who-are-not-also-stockholders (as distinguished from creditors-who-happen-also-to-be-stockholders) is needed before a disability is imposed beyond the plain terms of the section.

B. In defendant's own view of the facts, *i. e.*, that the sale to the plaintiff was of stock actually owned by a third party, the Bank acting merely as an agent in the transaction, plaintiff's judgment is plainly entitled to equal ranking.

Defendant has consistently maintained that the stock purchased by the plaintiff herein was not only previously issued and paid-in but indeed belonged to a third party, the securities affiliate, at the time of the sale to the plaintiff, and that the defendant Bank acted as an agent for the affiliate in the transaction. On this state of facts there is no conceivable reason why plaintiff should not have a claim against the receivership on a par with those of other general creditors. Neither the "trust fund" nor "reliance" arguments, nor the assessment statute nor any implication therefrom, advanced with respect to a sale by a banking corporation of stock which it owns, has relevance in a case where the capital stock has not only been fully paid-in but is owned by an independent third party and is sold by the corporation merely as agent for that party. This distinction is marked and observed in the cases. See *Williams* v. *Green, supra*, p. 797; *Julian* v. *Stewart, supra*, p. 34; *Litchfield Bank* v. *Peck, supra*. So far as the Bank, its creditors and other stockholders are concerned, the case is the same as if the Bank perpetrated a fraud in selling a share of American Telephone and Telegraph stock or an Atchison, Topeka and Santa Fe bond or some other chattel as agent for a third party. There is no more reason for depriving plaintiff of equal treatment herein than there would be if the claim arose out of a contract or delict wholly unrelated to Bank stock.

POINT II.

Assuming that where rescission is effected subsequent to "insolvency" the judgment thereon must be subordinated, that rule does not apply to the case at bar. The rescission and institution of the present action occurred months prior to the finding and declaration of insolvency by the Comptroller of the Currency. It is the date when such finding and declaration were made (and not the date when the Bank became unable to meet its obligations as they matured) that is controlling.

In this Point we assume *arguendo* that, in the ordinary case, where rescission of a stock purchase is effected after insolvency of the banking corporation, subordination of the claimant's judgment thereon is proper. It is here urged that that proposition has no applicability to the case at bar because the plaintiff effected the rescission and instituted suit thereon months before the Comptroller of the Currency declared the Bank to be insolvent and appointed a receiver. *It is submitted that it is only the date of such official finding and declaration of insolvency that is material.*

When the action was commenced no declaration of insolvency had been made and no receiver had been appointed. When the answer and amended answer were interposed the situation was still the same, and no allegation of insolvency was contained in either pleading. It was not until the trial that the defendants attempted to raise any contention concerning insolvency.

At the opening of the trial the defendants moved to amend their answer further by setting up that "At all times since on or about March 4, 1933, the defendant, [Bank], has been and now is insolvent" (R. 9). This motion to amend was opposed by the plaintiff (R. 8); the District Court allowed the amendment "tentatively" but never ruled upon it (R. 112) and did not consider the effect of insolvency. In the course of the trial, the plaintiff, reserving its objection to the materiality and sufficiency of the "tentative" amendment, conceded that the Bank was unable to meet its obligations as they matured on March 3, 1933 (R. 34, 38, 122-3). It was not proved, however, and cannot be assumed that the plaintiff had knowledge of this fact. The tender and demand, constituting the executed rescission herein, occurred on May 6, 1933, and suit was actually instituted on May 31, 1933. A conservator had been appointed for the Bank on March 13, 1933,* but a receiver was not appointed until October 16, 1933 (R. 39; Cross-pet., p. 2), and it was on that date that the Comptroller of the Currency officially declared the Bank insolvent (R. 122-3).

It is submitted that the fact that the Bank became unable to meet its obligations as they matured prior to the time of the rescission is not determinative. Rights in re-

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* A conservator may be appointed "whenever [the Comptroller] shall deem it necessary in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, * * *." 12 U. S. C., Section 203. Insolvency is not a condition necessary for the appointment. While the conservator is vested with the powers of a receiver so far as consistent with his status as a conservator (*id.*), his status is an interim one which may be, and frequently is, followed by returning the Bank to its board of directors. After the "banking holiday" of March, 1933, nation-wide publicity was indeed given to the fact that the mere appointment of a conservator did not mean that a Bank had failed.

spect to National Banks are fixed and determined not by reference to a date when the Bank was insolvent as that fact may be subsequently disclosed, but by the date of the declaration and finding of insolvency by the Comptroller of the Currency, who is charged by statute with the duty of making such a finding. *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131, 143; *Scott* v. *Armstrong, supra; Yardley* v. *Philler,* 167 U. S. 344; *American S. Co.* v. *De Carle,* 25 F. (2d) 18, 19 (C. C. A. 9). Referring to Rev. Stat., Section 5236 (now 12 U. S. C., Section 194), which exclusively governs distribution of assets in the receivership of National Banks (*Cook County Nat. Bank* v. *United States,* 107 U. S. 445), this Court, adverting to its earlier decision in *White* v. *Knox,* 111 U. S. 784, said, "The distribution is to be 'ratable' on the claims as proved or adjudicated, that is, on one rule of proportion applicable to all alike. In order to be 'ratable' the claims must manifestly be estimated as of the same point of time, and that date has been adjudged to be *the date of the declaration of insolvency.*" *Merrill* v. *National Bank of Jacksonville, supra,* p. 143. (Italics ours.) Manifestly, this is the only reasonable rule. "It is a matter of common knowledge that banks and other corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, *as disclosed by subsequent events.*" *McDonald* v. *Chemical National Bank,* 174 U. S. 610, 618. (Italics ours.) Until the declaration of insolvency by the Comptroller of the Currency, the fact of insolvency is unknown to the public.

Moreover, subsequent events may and often do occur which alter the original condition and render the existence of insolvency at the earlier date immaterial. Unlike stat-

utes of certain States which make it mandatory to close a Bank when insolvency appears, the Federal statute leaves it to the Comptroller of the Currency to determine whether affirmative action should be taken. Section 191 (12 U. S. C.) thus provides:

> "• • • whenever the comptroller shall become satisfied of the insolvency of a national banking association, he *may*, after due examination of its affairs, • • • appoint a receiver who shall proceed to close up such association, • • •" (Italics ours.)

The policy of the statute is to leave to the Comptroller's discretion not only the question of whether the Bank is insolvent but also whether under the circumstances it is for the best interest of all concerned to close the Bank forthwith or to permit it to remain open. In *Easton* v. *Iowa*, 188 U. S. 220, 232, this Court said:

> "Whether a bank is or is not actually insolvent may be, often, a question hard to answer. There may be good reason to believe that, though temporarily embarrassed, the bank's affairs may take a fortunate turn. Some of the assets that cannot at once be converted into money may be of a character to justify the expectation that, if actual and open insolvency be avoided, they may be ultimately collectible, and thus the ruin of the bank and its creditors be prevented. • • • In such a case the provisions of the federal statute would permit the Comptroller to withhold closing the bank, and to give an opportunity to escape final insolvency. It would seem that such an exercise of discretion on the part of the Comptroller would, in many cases, be better for all concerned than the unyielding course of action prescribed by the state law."

In the case of the defendant Bank the Comptroller actually did exercise his discretion by not closing the Bank when its insolvency was first known to him. In *O'Connor* v. *Bankers Trust Co.*, 159 N. Y. Misc. 920, where the Comptroller sued certain member Banks of the New York Clearing House Association (R. 38, 116, 123), it appeared that, although it was known only to the Comptroller and a few others, the defendant Bank was actually insolvent in May 1932 (p. 925), but because of assurances claimed to have been made by the defendant Banks, and because of the disastrous consequences which might have resulted at that critical time had he then closed the Bank, the Comptroller in his discretion refrained from doing so (p. 926). This disposition by the Comptroller, apparently fully justified in the light of the then existing facts, kept the Bank open as a going concern for many months after insolvency was known to him. This exercise of his discretion could have been justified only by his belief that subsequent events would solve the problem of the Bank's then condition of apparent insolvency.

Surely there is no rule, nor the basis for any rule, which would make such an undisclosed condition focal in determining the rights of a person defrauded by the Bank. The determining date can only be the date on which a definite, authoritative act occurs, indicating what this Court has called "final insolvency."

Independently, therefore, of the contentions made in Point I, *supra*, it is submitted that the plaintiff's judgment is entitled to share equally in the receivership estate.

POINT III.

Plaintiff is a defrauded *depositor*. The merits of his case are equal to those of other depositors and general creditors.

As a final argument supporting our position that the plaintiff's judgment is entitled to equal ranking, we lay renewed emphasis upon the fact that the plaintiff herein was and still is a depositor in the Bank. At the time of the fraud he had $30,000 in his Bank account (R. 26); he was fraudulently induced to diminish this balance by more than $15,000; he continued as a depositor in the Bank, having a balance of about $6,700 when the Bank failed (*id.*). In this action he seeks to be restored to the position he occupied before the fraud and to share equally with his fellow depositors in the receivership estate to the extent of his present deposit balance plus the amount (less proper offsets) of which he was swindled. He seeks only restoration of status as a depositor, having stated in rescinding, "I demand that my deposit account be credited with the sum of $12,187.00," *etc.* (R. 52). Whatever objection there may be to permitting a defrauded stockholder to convert himself into a creditor on proof of fraud, cannot apply where the attempt is merely to reinstate a depositor-creditor in his position as such. The subordinated judgment entered by the court below permits other depositors in the Bank to take the benefit of a fraud perpetrated on one of their fellows. Considerations of fairness dictate a contrary result.

POINT IV.

In refutation of the contentions of the defendant Bank, as cross-petitioner in No. 670.

The contentions that the plaintiff may not recover any judgment against the defendant Bank upon the grounds

(a) That the National Banking Act (12 U. S. C., Section 63) forbids the application of the fund raised by assessment of shareholders to the payment of non-contract claims (from which it is supposed to follow that there is no source out of which such claims may properly be satisfied);

(b) That the Act (12 U. S. C., Section 24 (7), and Sections 83, 56 and 59) absolutely prohibits rescission of stock purchases as against solvent and insolvent Banks;

(c) That the defendant Bank is not chargeable with the fraudulent representations of its officers in connection with the sale,

are plainly erroneous.

A.

The defendant Bank advances the following argument (Cross-pet., pp. 18-21): Section 63 imposes a limited assessment liability on stockholders (declared by the Comptroller and enforced by the receiver) for all "contracts, debts, and engagements" of the Bank; a claim such as the present, deriving from fraud of the Bank, is not a contract, debt or engagement; hence the plaintiff is not entitled to participate in the fund raised by the stock assessment, and therefore, presumably, is not entitled to any judgment whatever.

The effect of the defendant's argument, as it virtually concedes (Cross-pet., pp. 18-21), would be that no claim, other than one arising out of a contract, debt, or engagement, as thus narrowly defined, could be asserted against a National Bank in receivership,—even if such claim was established long prior to the insolvency of the Bank and even if it arose out of a transaction having nothing to do with Bank stock. For, the defendant argues, if the claim does not arise from a contract, debt or engagement of the Bank, the Comptroller may not predicate any part of the assessment thereon; therefore the claim may not share in the fund raised by assessment; therefore it may not share in that fund *or* in the remaining assets of the Bank. A mere statement of the far-reaching consequences of defendant's reasoning shows its basic invalidity.

The argument is wholly fallacious for several other reasons.

(i) If it be assumed, as the defendant argues, that the Comptroller of the Currency may not predicate the assessment in part or in whole upon an outstanding fraud liability (or other non-contract obligation of the Bank), his doing so would merely afford stockholders a possible partial or complete defense to the suit for the assessment. The assessment is now presumed valid and is conclusive and immune from collateral attack. *Studebaker* v. *Perry*, 184 U. S. 258. And no reason suggests itself why the fund, having been *properly* raised by assessment, may not now be used (together with the remaining assets of the Bank) to pay fraud liabilities as well as other non-contract and contract obligations of the Bank.

In the present case it would make no difference to stockholders whether the plaintiff's claim is allowed to share on

a parity with the claims of other creditors. The Comptroller has made an assessment upon stockholders for the full amount (R. 38-39). Obviously he did not base this upon the plaintiff's claim but made the assessment because the assets on hand were insufficient to meet the Bank's "contracts, debts, and engagements" at least to the amount sought by the assessment. Hence it does not cost the stockholders one additional dollar if the fund raised by assessment is used in part to pay a fraud or other non-contract liability of the Bank.*

(ii) Again, even if the fund actually raised by assessment can be devoted only toward payment of contracts, debts and engagements of the Bank and even if a claim deriving from fraud of the Bank is held not to fall within this category, the effect would be merely to debar the plaintiff from sharing in *that* specific assessment fund. He would nevertheless be entitled to rescind and share in the assets of the Bank apart from the fund raised by assessment. The defendant does not advance any reason whatsoever why this latter source of payment is not available for non-contract claims.

(iii) Taken in this qualified sense, the defendant's argument would result in creating two separate funds upon in-

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* Recognizing the inherent weakness in the argument now under consideration and that it is unsupported by the authorities in this country, the defendant Bank has cited English authority (Cross-pet., pp. 13-15) for the proposition that a defrauded shareholder may not seek reimbursement *from other shareholders*. Enough has been said about the English law to show its utter inapplicability to the situation at bar (*supra*, pp. 18-20).

solvency; first, the fund raised by assessment,* against which there could not be asserted any non-contract claim; second, the remaining assets of the Bank, against which all varieties of claims could be asserted. These peculiar notions of distribution are not supported by the National Banking Act, which manifests a clear intent that the fund raised by assessment and all the remaining assets of the Bank shall, upon insolvency, be subjected to all valid claims, whether *ex contractu* or *quasi ex contractu* (see 12 U. S. C., Sections 192 and 194; *King* v. *Armstrong,* 50 Ohio St. 222); nor, it may be confidently stated, are they followed in the actual administration of insolvent National Banks.**

(iv) Finally, it has in fact been repeatedly held that claims for money had and received (such as the plaintiff's claim herein upon the executed rescission, which lies in *indebitatus assumpsit*) may share equally with other unsecured creditors' claims in *both the fund raised by the assessment and the remaining assets of the Bank,* familiar instances being *Aldrich* v. *Chemical National Bank,* 176 U. S. 618 (see Transcript of Record, pp. 275-6, 277); *Rankin* v. *Emigh,* 218 U. S. 27, 35-6; see also *Case* v. *Citizens' Bank,* 100 U. S. 446; *Stanton* v. *Wilkenson,* Fed. Cas. No. 13,299

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* The argument might well apply also to the capital of the Bank, since Section 63 also contains the phrase "in addition to the amount invested in such shares."

** In his public reports relating to receiverships of National Banks the Comptroller of the Currency uniformly lists the fund raised by stock assessment as a collection and shows disbursements against the sum total collected from all sources including the fund raised by assessment. There is no indication of any separate accounting with respect to the fund raised by assessment. See, *e.g.,* SEVENTY-FOURTH ANNUAL REPORT OF THE COMPTROLLER OF THE CURRENCY (Treas. Dept. Doc., 1937), pp. 26-41.

(S. D. N. Y.); *Bereth* v. *Sparks*, 51 F. (2d) 441, 442-3 (C. C. A. 7); *Turner* v. *First National Bank*, 26 Iowa 562.*

B.

The defendant Bank contends (Cross-pet., pp. 26-27) that rescission should be entirely disallowed by reference to 12 U. S. C., Section 24 (7) (as amended February 25, 1927, c. 191, Section 2, 44 Stat. 1226), which provides that buying and selling of bonds, notes or debentures, commonly known as investment securities, shall be limited to buying and selling "without recourse." Of this argument, sought to be supported by the citation of *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209, the court below properly said (R. 113-114):

> "• • • To say the least, it is highly doubtful whether this language can be stretched to include the purchase and sale of stock, and particularly of the bank's own stock. Compare the amendment of August 23, 1935, which uses the words 'securities and stock' (49 Stat. 709, §308 [12 U. S. C. A. §24]). But assuming that it can, the statute would still be inapplicable to the case at bar. The evil aimed at by the statute was the incurring of liability by the bank in consequence of an indorsement, guaranty, or re-

* The only authority cited (Cross-pet., p. 19) in support of the restricted definition of "contracts, debts, and engagements" is *Clinton Mining & Mineral Co.* v. *Beacom*, 266 Fed. 621 (C. C. A. 3), *cert. den.*, 254 U. S. 637. That case did not involve a construction of Section 63. Moreover, it was a suit by a creditor *to enforce* a statutory assessment, and neither said nor held anything as to how the fund actually raised by assessment should be distributed. The inappositeness of the *Clinton* case is shown by the fact that the same circuit, in *Salter* v. *Williams, supra*, held not only that a defrauded shareholder may rescind following insolvency, but that such claim ranks equally in distribution with the claims of other general creditors.

> purchase agreement with respect to securities it sold. *Awotin* v. *Atlas Exchange Bank,* 295 U. S. 209, 55 S. Ct. 674, 79 L. Ed. 1393. It had nothing to do with tort liability arising out of fraud; nor can it be construed to forbid incurring the liability imposed by law when a contract of sale, induced by fraud, is rescinded."

It should be added that the effect of defendant's argument, if sustained, would be to render impossible not only rescission of a fraudulent sale of Bank stock, but of virtually any security, and this whether rescission was attempted against a solvent or insolvent Bank. It would thus confer an immunity on National Banks against the consequences of its own fraud,—an indefensible result.

Equally strained and untenable is the argument (Cross-pet., pp. 21-26) that rescission of a Bank stock purchase for fraud is impliedly prohibited by 12 U. S. C., Sections 83, 56 and 59, providing that a National Bank may not purchase its own stock except to prevent loss upon a debt previously contracted, and may not withdraw or reduce its capital except by vote of two-thirds of its shareholders, approval of the Comptroller of the Currency, *etc.* This argument, if sustained, would also have the effect of rendering rescission for fraud impossible before as well as after insolvency of a National Bank. We think it plain, as the lower court held concerning Section 24 (7), that the sections now considered have nothing to do with liabilities imposed by law when a contract of sale induced by fraud is rescinded. No case has purported to apply these sections to such a situation. *Schechter* v. *Sherwin,* 81 F. (2d) 603 (C. C. A. 7), cited by the defendant Bank (Cross-pet., p. 24), is simply an instance of an attempted repudiation of a stock purchase before insolvency of the Bank,

held to be ineffectual because no fraud was found. See 81 F. (2d), at p. 605.

C.

The defendant Bank argues that the decision below is erroneous "because it imposes liability upon a national bank for the fraud of its officers in connection with the sale of the shares of its corporate stock which said shares were not sold from among its assets but were the property of another and it was not enriched by the transaction" (Cross-pet., p. 28).

Without rehearsing the evidence, it is enough to quote from the opinion below, which completely disposes of all phases of this contention.

As to the argument that the stock purchased by the plaintiff was not owned by the Bank but by its affiliate, Harriman Securities Corporation, prior to the sale, and that therefore the Bank could not be held liable, the lower court stated (R. 112-113, 114):

"The defendants' proof tended to show that the stock purchased by Oppenheimer was not owned by the bank but by its affiliate, Harriman Securities Corporation. The bank maintained in its bond department an account known as 'Harriman Securities Corporation Suspense Account,' in which were reflected purchases and sales of Harriman Bank stock made for the account of said affiliate. To the extent that the account was long of the stock it represented an indebtedness of the affiliate to the bank. Certificates of stock purchased for the suspense account were put in the name of one Kelly, not an employee of the bank, as nominee of the Securities Corporation. The ten shares sold to Oppenheimer stood in Kelly's name, and the suspense

account was credited with the sum received by the bank from Oppenheimer, less $100 retained by the bank as its commission on the sale. It is conceded, however, that Oppenheimer had no knowledge of any transactions between the bank and its affiliate and believed that he was dealing with the bank as a principal in his purchase of the stock. It is also conceded that a fraud was practised upon him by Harriman and Williamson, the dispute as to this being only whether the bank is chargeable with their fraud. • • •

"Much of the argument in the briefs is directed to the controverted question whether the bank, as a principal, sold its own stock, or, as an agent, sold stock owned by the Securities Corporation. We cannot see that this dispute is at all material here. In either event, the plaintiff dealt only with the bank; he had no knowledge that any third party was involved. If the bank sold stock belonging to its affiliate, as the defendants contend, it sold for an undisclosed principal and was itself a party to the contract. AMERICAN LAW INSTITUTE, RESTATEMENT OF AGENCY, §321. When an agent for an undisclosed principal induces a sale by fraud, he must account for the purchase price, if the contract is rescinded, even though he has paid it over to his principal. *Id.*, §341; *McClure* v. *Central Trust Co.*, 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153. Therefore, whether the stock belonged to the bank or to the Securities Corporation, the fundamental issue is the same, namely, whether the fraudulent representations of Harriman and Williamson are attributable to the bank."

And as to the argument that the Bank's officers did not have apparent or actual authority to make the sale on behalf of the Bank (and thus the representations incidental thereto), the lower court stated (R. 114-115):

"Despite the defendants' contention to the contrary, we think it indubitably plain that these officers had apparent, if not actual, authority to make the sale on behalf of the bank. If the stock was property of the bank, its acquisition of it may have been *ultra vires*, for only in special circumstances may a bank purchase its own stock. 12 U. S. C. A. §83. Nevertheless a corporation may transfer title to property which it was *ultra vires* to acquire (*Lantry* v. *Wallace*, 182 U. S. 536, 553, 21 S. Ct. 878, 45 L. Ed. 1218); and the plaintiff is not charged with notice that its ownership was unlawful, since under some circumstances it could be lawfully acquired. *National Bank & Loan Co.* v. *Petrie*, 189 U. S. 423, 424, 23 S. Ct. 512, 47 L. Ed. 879. The sale appeared to be lawful, and the bank's president and vice president had apparent authority to represent it in negotiating such sale. If, on the other hand, the stock belonged to the Securities Corporation, these officers would have actual authority to cause the bank to make a sale as agent for the owner, whereby a commission was earned for the bank and the proceeds of the sale were applied to reduce the owner's indebtedness to the bank. Hence whichever the ownership of the stock, the officers who negotiated with the plaintiff had at least apparent authority to make the sale. If this be so, their representations incidental to the sale by the bank (either as principal or agent) are attributable to the bank, since the plaintiff had no notice that the representations were unauthorized. *Salter* v. *Williams*, 244 F. 126 (C. C. A. 3); AMERICAN LAW INSTITUTE, RESTATEMENT OF AGENCY, §§257, 258; 7 MICHIE, BANKS AND BANKING, §173."

If, as the lower court held and as the evidence conclusively shows, the sale (and thus the representations

incidental thereto) were within the actual or apparent authority of the Bank's officers and agents, the Bank is chargeable irrespective of whether it was "enriched" by reason of the fraud. This is familiar doctrine. This Court observed in *James-Dickinson Farm Mortgage Co.* v. *Harry*, 273 U. S. 119, 123:

> "If Dickinson, either personally or through agents, made knowingly false statements with intent that the plaintiff should act upon them, his liability • • • would not depend upon the receipt of any benefit by him." [Citing cases.]

See also, *National City Bank* v. *Carter*, 14 F. (2d) 940, 31 F. (2d) 25 (C. C. A. 6); *Wasmann* v. *City National Bank of Knoxville*, 52 F. (2d) 705 (C. C. A. 6); *First National Bank of Silverton* v. *Mercantile National Bank of Pueblo*, 273 Fed. 119 (C. C. A. 8); *Stewart* v. *Wright*, 147 Fed. 321 (C. C. A. 8); *L'Herbette* v. *Pittsfield National Bank*, 162 Mass. 137; *Eastin* v. *Bank of Harrisonville*, 213 Mo. App. 130; *Phillips* v. *Mercantile National Bank*, 140 N. Y. 556; *Doerstler* v. *First National Bank*, 82 Ore. 92.

If it be deemed material, however, it is plain that the fraud herein had its origin in an attempt to maintain the Bank as an apparently solvent institution, and actually resulted—by the tangible receipt by the Bank of a check drawn to its order—in that "enrichment" or "benefit" to the Bank which would suffice to fasten liability upon it by ratification even if its agents were not actually or apparently authorized to effect the sale and so to make representations in connection therewith.

The fraudulent sale to the plaintiff was one step in a scheme to maintain an artificial price for Harriman Bank stock by "rigging" the market. The value of the stock

was drastically declining and the Bank took steps to prevent this fact from becoming known to the public. Like other Bank stock, Harriman stock was unlisted and sold over the counter. The quotations appearing in the newspapers were obtained by telephoning the Unlisted Security Dealers Association and the Association of Bank Stock Dealers (R. 74). These Associations secured their quotations from certain dealers in Bank stock (R. 75). The dealers based the quotations which they furnished the Associations upon sales made by their houses (R. 64, 71, 75). The record shows that for a lengthy period of time the dealers made very few sales of Harriman Bank stock to persons other than the Bank (R. 63-70). By this method, the Bank was able to create a fictitious price which was widely published, and maintain an appearance of prosperity.

As part of the scheme, it was of course necessary for the Bank to unload the stock which it had thus purchased; otherwise it would soon deplete its own resources. This it did by inducing certain of its depositors to buy Bank stock, by reference to the deceptive market quotations and by other fraudulent representations. The record shows that the ten shares sold to the plaintiff were transferred to him from stock acquired by Kelly (R. 75-6), a dummy, in whose name title was taken to stock purchased from time to time by the Bank from specialists (R. 76-81). Vice-president Williamson lied when he told the plaintiff that the stock came "from an estate."

The Bank stock in the name of the dummy Kelly, from which the sale to the plaintiff was made, was entered in a "suspense account" entitled Harriman Bank "in account with Harriman Securities Corporation" (shown in part at

R. 103-5), physically in the possession of the Bank. During the life of the account the affiliate was indebted to the Bank and the Bank had a lien for any indebtedness of the affiliate to it upon any property of the affiliate in the Bank's possession (R. 33-4). As the account acquired Bank stock —it dealt solely in that stock—the "debit balance" of the account in favor of the Bank was increased (R. 103-5); as the account disposed of shares, the Bank was repaid to that extent and the debit balance was thereby reduced (*id.*; R. 33).

Assuming that this "suspense account" was a simple agency (or "brokerage") account between the Bank and an independent third party, the Securities Corporation, as the defendant contends, the situation was as follows:

The plaintiff paid for his stock by a check drawn to the order of Harriman National Bank (R. 49). The check was received by the Bank, marked paid with the initials of the Bank, and not further endorsed (*id.*) Thus it is clear that the Bank actually received the money and retained it. It is certainly no part of the plaintiff's case to inquire what happened to the money after it was received by the Bank and receipted for. But if further inquiry be made and the defendant's view of the inter-corporate accounting between the Bank and its affiliate be adopted, we find merely that the fund, less "commissions," which were wholly retained by the Bank (R. 33), was credited to the Securities Corporation to reduce its outstanding indebtedness to the Bank. The suspense account had a "long" position, *i.e.*, showed a "debit" balance in favor of the Bank. The amount received by the Bank (less "commissions") was credited to the Securities Corporation in the account, the "debit balance" was reduced, as a payment

was drastically declining and the Bank took steps to prevent this fact from becoming known to the public. Like other Bank stock, Harriman stock was unlisted and sold over the counter. The quotations appearing in the newspapers were obtained by telephoning the Unlisted Security Dealers Association and the Association of Bank Stock Dealers (R. 74). These Associations secured their quotations from certain dealers in Bank stock (R. 75). The dealers based the quotations which they furnished the Associations upon sales made by their houses (R. 64, 71, 75). The record shows that for a lengthy period of time the dealers made very few sales of Harriman Bank stock to persons other than the Bank (R. 63-70). By this method, the Bank was able to create a fictitious price which was widely published, and maintain an appearance of prosperity.

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by the Securities Corporation to the Bank. The "benefit" to the Bank is, then, perfectly clear. By virtue of the sale the Bank was able to reduce the alleged indebtedness running between the Securities Corporation and itself. It is as if *A* is indebted to *B* and engages *B* to sell his property with the understanding that *B* shall retain the sale price and credit *A* with that amount. When *B* effects the sale and makes the credit he is as much benefited as if he received the money for a sale of his own property. Similar circumstances were present in *Salter* v. *Williams, supra,* and the Bank was held liable. See also, *American Surety Co. of New York* v. *Philippine National Bank,* 245 N. Y. 116, *cert. den.,* 275 U. S. 549; *Appleton* v. *Citizens Central National Bank,* 190 N. Y. 417, *aff'd,* 216 U. S. 196; *Aldrich* v. *Chemical National Bank, supra; Nevada Bank* v. *Portland National Bank,* 59 Fed. 339 (D. Ore.); *National Bank of Commerce* v. *Equitable Trust Co.,* 227 Fed. 526 (C. C. A. 8), *cert. den.,* 239 U. S. 648.

CONCLUSION.

The resettled judgment of the Circuit Court of Appeals for the Second Circuit should be modified.

Respectfully submitted,

EDWARD S. GREENBAUM,
Solicitor for Henry E. Oppenheimer,
Petitioner and Respondent.

EDWARD S. GREENBAUM,
THEODORE S. JAFFIN,
BENJAMIN KAPLAN,
of counsel.

Supreme Court of the United States

OCTOBER TERM—1936.

No. 588.

HENRY E. OPPENHEIMER,

Petitioner,

—against—

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK and HENRY E. COOPER, as Conservator of The Harriman National Bank and Trust Company,

Respondents.

No. 670.

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK,

Petitioner,

—against—

HENRY E. OPPENHEIMER,

Respondent.

On Cross Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK, RESPONDENT IN NO. 588 AND PETITIONER IN NO. 670.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 588.

HENRY E. OPPENHEIMER,

Petitioner,

—against—

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK, *et ano.*,

Respondents.

No. 670.

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK,

Petitioner,

—against—

HENRY E. OPPENHEIMER,

Respondent.

ON CROSS WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK, RESPONDENT IN NO. 588 AND PETITIONER IN NO. 670.

On Cross Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that court (R. 132-133), revising a judgment of the United States District Court

for the Southern District of New York and granting judgment *sub modo* in favor of the petitioner, Henry E. Oppenheimer, and against The Harriman National Bank and Trust Company of the City of New York in an action at law on rescission of sale to recover from said Bank and its Conservator the purchase price of shares of the Bank's stock which the plaintiff was induced to purchase by fraud (R. 132-133).

Opinions Below.

The District Court filed no opinion. The grounds of its decision were stated orally from the bench at the close of the trial (R. 46).

The opinion of the Circuit Court of Appeals, reversing the judgment of the District Court (R. 111-116), is reported in 85 F. (2d) 582.

Jurisdiction.

The judgment was entered November 9, 1936 (R. 132-133). Cross writs of certiorari were granted February 8, 1937 (R. 135).

The jurisdiction to review the judgment complained of by writ of certiorari is conferred by section 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (Title 28 U. S. C., §347 [a]).

Questions Presented.

1. May a shareholder in a national bank rescind his purchase of stock from the bank and thereby oblige the bank to acquire the stock?

2. Is a national bank liable for the misrepresentations of its officers in selling shares of its stock not

its property, when the bank was not enriched by the transaction?

3. May a shareholder in a national bank rescind his purchase after the insolvency of the bank and participate in the proceeds of an assessment levied by the Comptroller of the Currency upon the other shareholders?

4. Is a shareholder in a national bank barred by the insolvency of the bank from asserting a claim for fraud in the purchase of his stock against the receivership assets where claims of creditors have accrued since the purchase?

5. May a defrauded shareholder in an insolvent national bank share *pari passu* with the creditors in the distribution of the assets of such bank in liquidation?

Statutes Involved.

The validity of no statute is involved.

The questions presented require the consideration of various sections of the National Bank Act as constituting a statutory plan for the conduct of national banks and the regulation of the relations between the shareholders of such institutions and their depositors and creditors.

The sections of the National Bank Act will be referred to and set forth, when necessary, at the appropriate places in the discussion which follows.

Statement.

Action at law by Henry E. Oppenheimer as plaintiff* against The Harriman National Bank and Trust

* Inasmuch as each party is both a petitioner and a respondent, we shall, for convenience, refer to Oppenheimer as "the plaintiff".

Company of the City of New York and Henry E. Cooper as Conservator of The Harriman National Bank and Trust Company, defendants, to recover the purchase price of shares of the Bank's stock which plaintiff was induced to purchase by fraud.

Plaintiff, who was at that time and now is a depositor in the Bank, purchased on November 1, 1930, 10 shares of the Bank's capital stock and received a certificate for the shares (R. 3-5).

The purchase was induced by representations as to the value of the shares made by one Williamson, a vice president of the Bank (R. 10-13).

The stock sold to plaintiff was the property of its affiliate, the Harriman Securities Corporation,* and the proceeds of the sale, less $100 commission, were credited to the Securities Corporation on the Bank's books (R. 32-34, 46, 112-114).

Plaintiff sold two shares of the stock in May, 1932 (R. 15). He received three dividends paid respectively in January and July, 1931, and January, 1932 (R. 15).

On March 3, 1933, the Bank was closed by reason of the bank holiday and never reopened. It was then insolvent (R. 34). A conservator was appointed on March 13, 1933, and a receiver on October 16, 1933.

During the period after plaintiff acquired the shares, claims of new creditors accrued against the Bank in excess of ten million dollars (R. 34, 38).

In May, 1933, two months after the Bank was closed and two and one-half years after plaintiff had acquired the stock, he read in a newspaper that an

* The Securities Corporation was organized for the purpose of holding and dealing in securities (R. 90). Its stock was held by trustees under an agreement (R. 89-95) by which the stockholders of the Bank were entitled to a beneficial interest in proportion to their holdings of Bank stock, that fact being endorsed on the certificates of Bank stock (R. 50).

action had been brought against the bank by another stockholder charging fraud in the sale of shares of the Bank's stock (R. 18). Thereupon plaintiff tendered to the conservator the remaining 8 shares of stock owned by him and demanded payment of the purchase price (R. 19-20, 51-52). The conservator rejected the demand and the present action was begun on May 31, 1933 (R. 1).

The trial was before a judge and jury. When both sides rested, each moved for the direction of a verdict and the trial judge, to whom the determination of the facts was thus submitted by both parties, found that the Bank was not enriched by the sale of the stock to plaintiff and that the officers who dealt with plaintiff had no actual or apparent authority to make the representations in connection with the sale of the stock (R. 46).

Accordingly, he directed a verdict in favor of the Bank and its co-defendant. The plaintiff did not move to go to the jury on any question of fact (R. 44, 45). Judgment was entered on the directed verdict (R. 7-8) and plaintiff appealed (R. 106-108).

The Circuit Court of Appeals held that the Bank's officers who had made the fraudulent representations were clothed with actual or apparent authority so as to bind the Bank by their representations (R. 114-115).

The Circuit Court of Appeals approved the rescission by plaintiff of the sale of the shares, and adjudged that plaintiff is entitled to recover the amount demanded in the complaint.

As plaintiff did not attempt to rescind until May, 1933, after the Bank had become insolvent and its doors were closed, the Circuit Court of Appeals held that he could not at that time "change his status

from that of shareholder to that of creditor to the detriment of general creditors" (R. 115-116).

The result was that although the Circuit Court of Appeals held that "rescission should be allowed as against the corporation", it ruled that the judgment to be entered should "give the plaintiff no claim entitled to share in the assets of the receivership until after payment of all who were creditors when the bank became insolvent" (R. 116).

Accordingly, the judgment of the District Court was reversed and the order for mandate directed "that judgment for the amount demanded in the complaint be entered against the defendant, The Harriman Bank and Trust Company of the City of New York, collectible out of the assets of the receivership after payment in full of all who were creditors when the said bank became insolvent" (R. 132-133).

The Circuit Court of Appeals dismissed the action as to the conservator because a receiver for the Bank had been appointed during the pendency of the action (R. 132).

Specifications of Errors to be Urged.

1. The Circuit Court of Appeals committed material error in holding that the demand of the plaintiff for rescission of the sale of shares of stock of The Harriman National Bank and Trust Company should be allowed as against the bank (R. 116).

2. The Circuit Court of Appeals committed material error in directing judgment in favor of the plaintiff entitling the latter to share in the assets of the receivership (R. 116).

Summary of Argument.

I.

A National Bank may not incur liability by contract or otherwise to retake shares of its own stock sold by it either as principal or agent.

II.

A National Bank may not be held liable for the misrepresentations of its officers in selling shares of its corporate stock not its property, when it is not enriched by the sale.

III.

The assessment on the shareholders of a National Bank may not be charged with the claim of a rescinding shareholder.

IV.

A shareholder in a National Bank is barred after insolvency from rescinding his purchase of its shares.

V.

A defrauded shareholder of a National Bank may not after insolvency share ratably with the depositors and creditors in the distribution of the Bank's assets.

POINT I.

A National Bank may not incur liability by contract or otherwise to retake shares of its own stock sold by it either as principal or agent.

A national bank cannot purchase its own stock except to prevent loss previously contracted.

> "Section 83. *Loans on or purchase by bank of own stock.* No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security

or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section 192 of this title."

12 U. S. C. §83 (R. S. §5201).

Not only is a national bank prohibited from acquiring shares of its own stock except under the conditions defined by 12 U. S. C., §83, but it is also prohibited from withdrawing any portion of its capital.

"Section 56. *Prohibition on withdrawal of capital; unearned dividends.* No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw or permit to be withdrawn either in the form of dividends or otherwise any portion of its capital * * *. But nothing in this section shall prevent the reduction of the capital stock of the association under section 59 of this title."

12 U. S. C. §56 (R. S. §5204).

The only provision for reduction of capital is as follows:

"Section 59. *Reduction of capital by vote of shareholders.* Any association formed under this chapter may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this chapter to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any reduction be made until the amount of the proposed reduc-

tion has been reported to the Comptroller of the Currency and such reduction has been approved by the said Comptroller of the Currency and no shareholder shall be entitled to any distribution of cash or other assets by reason of any reduction of the common capital of any association unless such distribution shall have been approved by the Comptroller of the Currency and by the affirmative vote of at least two-thirds of the shares of each class of stock outstanding, voting as classes."

12 U. S. C., §59 (R. S. §5143; Dec. 23, 1913, c. 6, §28, 38 Stat. 274; August 23, 1935, c. 614, §334, 49 Stat. 720).

These provisions of law constitute a statutory plan intended to prevent consequences which have been thus described:

"At the time this proceeding took place the Currency Act of 1863 had been superseded by the Act of June 3, 1864, which expressly repealed the former act. It is, therefore, by the provisions of the latter act that the conduct of bank associations must be governed, whether they were organized before or after they became a law. And in looking into this act we find these associations expressly prohibited from making any loan or discount on the security of the shares of their own capital stock. And so marked is the policy of Congress on this subject that it does not allow a bank to become the purchaser or holder of its shares at all unless absolutely necessary to prevent loss on a debt previously contracted in good faith, and not then for a longer period than six months. It is easy to see that if the power were given to a bank to loan money on the security of its shares, it would imply also a power to become the owner of its shares, and that Congress intended to guard against.

> These institutions were created to subserve public purposes, and not the mere private interests of their stockholders. And in no better way could this object be attained than by placing shareholders in their pecuniary dealings with the bank on the same footing with other customers. Besides how could the capital of the bank be kept available for active use if the shareholder who had pledged his stock for borrowed money should be unable to meet his obligation? To the extent of the debt the capital would be withdrawn and it is hardly possible that this could be the case for any length of time with the debts secured outside of the shares of the bank. But it is unnecessary to seek for the reason of this prohibition, as the provision concerning it is explicit and free from ambiguity."

Bank v. *Lanier,* 11 Wall. 369, 374-375.

> "The object and the policy of the statute in prohibiting a bank from purchasing outright its stock is to prevent the reduction of its outstanding stock, and the withdrawal *pro tanto* of its capital. *Bank* v. *Lanier,* 11 Wall. 374, 375."

Wallace v. *Hood,* 89 F. 11, 13.

The purpose intended to be accomplished by the various statutory provisions relating to national banks is that at all times the bank's stock shall be fully paid and that the bank shall have outstanding the amount of its capital stock for the security of its creditors and for the transaction of its business.

> "The Bank president could not lawfully acquiesce in the attempted rescission. A surrender of the stock by appellee and an acceptance of it by the bank would have constituted an unauthorized reduction in the capital stock of the banking association. The capital stock of a national bank-

ing association may be reduced pursuant to section 59, title 12, U. S. C. A., and not otherwise."

Schechter v. *Sherwin,* 81 F. (2d) 603, 605 (C. C. A. 7).

The provisions of the statutes and the expressions of the courts to which attention has been directed would seem to justify the following conclusions:

A national bank must have a fixed amount of stock, which must be paid in within six months after commencement of business (12 U. S. C. §51, 51c, 53*). The aggregate of such stock represents a fund to which the creditors may look in the event of insolvency to cover deficiency in assets (Id., §54**).

When the stock has been issued, the law contemplates that its quality of being outstanding shall not be affected otherwise than by the reduction to be accomplished under Revised Statutes §5143 (12 U. S. C. §59), except where acquisition of shares is necessary to permit realization upon a debt owing to the bank contracted prior to such acquisition. Even in a case falling within this category, the stock that is temporarily withdrawn must be put out again within six months under penalty of closing the bank.

In this state of the law, a requirement that the bank shall accept shares of its own stock as the result of invoking the doctrine of rescission would seem to involve consequences not permitted by the scheme of laws relating to national banks and in apparent violation both of their terms and policy.

Therefore, when demand was made upon the conservator to accept from the plaintiff, after insolvency of the Bank, the shares in question and pay the plaintiff the amount paid by him for such shares, it is manifest that the conservator could not legally com-

* Set forth in full in Appendices A, B and C hereto, pp. 51-53.

** Set forth in full in Appendix D hereto, p. 53.

ply with such demand, and it seems to be equally manifest that the court should not compel such compliance.

It would seem to make no difference whether the acquisition by a bank of its own stock was *ultra vires*, or, in the special circumstances in which the bank may purchase its own stock.

> "The purchase of this stock by the bank under the circumstances disclosed by the answer was doubtless *ultra vires*, but the purchase in question did not render the stock void. In purchasing it the bank made an unlawful use of its funds for which the officers concerned in the transaction could have been held responsible as for any unlawful act if the corporation had sustained damage; but in point of fact by the sale of the stock to the defendant that portion of its capital which had been dissipated by the purchase was restored by the resale and no loss seems to have been incurred."
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> *Lantry* v. *Wallace*, 97 Fed. 865, 868. Approved 182 U. S. 536, 553.

The sale of stock acquired by a bank by purchase *ultra vires* does not render the sale unlawful, since it operates to restore that part of the capital which had been retired by the purchase.

> "The sale of the stock to the defendant after the bank had purchased the same was not unlawful since it operated to restore that part of the capital that had been retired, and to that extent repaired the wrong which might otherwise have been done to the bank's creditors."
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> *Lantry* v. *Wallace*, 97 Fed. 865, 869, approved 182 U. S., pp. 553-4.

Therefore the purchaser of such stock from a bank cannot avoid payment of the stock assessment levied by the Comptroller under 12 U. S. C., §64.

> "We are at a loss to understand how this transaction on the part of the bank can operate to relieve the defendant from his liability as a stockholder in a suit brought by the receiver to recover a stock assessment which was levied solely for the benefit of corporate creditors."
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> *Lantry* v. *Wallace*, 97 Fed. 865, 869, approved 182 U. S. at p. 553.

Since it is of no consequence, so far as the passing of title to the purchaser from the bank and the liability of the purchaser to pay the assessment which may be levied on the stock are concerned, whether the bank acquired the stock in a permitted or forbidden transaction, we have next to inquire whether the bank in disposing of the stock can render itself liable to retake it. That is the nature of the present action. This question is of continuing importance because it will survive the repeal of stockholders' double liability under the recent statutes (12 U. S. C., §64-a; Act of June 16, 1933, c. 89, §22, 48 Stat. 189; Act of August 23, 1935, c. 614, §304, 49 Stat. 708).

To require a national bank to retake shares of its stock because in selling the same the officers of the bank have made fraudulent representations would permit the bank to accomplish by indirection what apparently it is prohibited from doing directly.

It can hardly be contended that if a bank sold its stock under a repurchase agreement, the repurchase feature of the transaction would be valid (see *Norwalk* v. *Marcus*, 235 App. Div. [N. Y.] 211; aff'd 261 N. Y. 615, *infra*, pp. 17-21), and yet that is in effect what is accomplished by permitting rescission of

an executed sale of the bank's stock, on the ground that such sale was accomplished by fraudulent misrepresentations.

Revised Statutes, §5136, par. 7 (12 U. S. C., §24, par. 7), authorizes national banks to carry on a banking business and defines banking powers. Prior to the Act of February 25, 1927, c. 191, §2, 44 Stat. 1226, which amended R. S., §5136, par. 7, no direct reference was contained in the recitation of the corporate powers of such associations as to dealing in investment securities (*Awotin* v. *Atlas Exchange National Bank,* 295 U. S. 209, 212). By the statute referred to the business was recognized, but

> "limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person * * * or corporation, in the form of bonds, notes, and/or debentures, commonly known as investment securities. * * *"

By further amendments (Act of June 16, 1933, c. 89, §16, 48 Stat. 184, and Act of August 23, 1935, c. 614, §308, 49 Stat. 709), the corporate powers of national banks in the respect referred to were modified, as will appear by the following parallel columns showing the changes in R. S., §5136, par. 7, so far as we are concerned with them, viz:

> "Seventh: To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal securities; and by obtaining, issuing and circulating notes according to the provisions of this title." (Revised Statutes §5136, derived from Act of June 3, 1864, c. 106, §8.)

[Added by 1927 Act]

"Provided, that the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse

marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes and/or debentures, commonly known as investment securities, under such further definition of the term 'investment securities' as may by regulation be prescribed by the Comptroller of the Currency

[Additions of 1927 as Changed by 1933 Act]

"The business of dealing in investment securities by the association shall be limited to purchasing and selling such securities without recourse,

solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities; Provided, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe • • • [followed by a limitation as to the amount]. As used in this section the term 'investment securities' shall mean marketable obligations evidencing indebtedness

[etc. as in 1927 Act].

[Same as further Changed by 1935 Act]

"The business of dealing in securities *and stock*• by the association shall be limited to purchasing and selling such securities *and stock*• without recourse, solely upon the

[etc. as in 1933 Act].

•Italics ours.

[followed by a limitation as to the amount] • • • ."	Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association of any shares of stock of any corporation • • • ."	Except as hereinafte provided or otherwis permitted by law, noth ing herein containe shall authorize the pur chase by the associatio for its own account o any shares of stock o any corporation • • • ."

It was obviously not intended by Congress under the last amendment (Act of August 23, 1935, c. 614, §308, 49 Stat. 709), which authorizes limited dealing in *stock*, to modify the provisions of Revised Statutes, Sec. 5201 (Title 12 U. S. C., §83), forbidding national banks to loan on or purchase their own stock.

It must be assumed, therefore, that the existing provisions of the National Bank Act, to which we have directed attention, which prohibit transactions in the stock of a bank (12 U. S. C., §83) and the withdrawal of its capital (12 U. S. C., §56), and which provide the only method by which reduction of capital may be effected (12 U. S. C., §59), were ample to accomplish the same prohibition on the incurring of contingent liabilities resulting from transactions in its own stock as was effected with respect to dealings in other securities by the amendments of Revised Statutes, Sec. 5136, to which we have referred.

In short, it is all part of a statutory plan, the nature of which is indicated by the decision of this Court in *Awotin* v. *Atlas Exchange National Bank*, 295 U. S. 209. In that case, the effort was to compel a national bank to retake securities which it had sold under a contract that violated Section 5136 of the Revised Statutes (12 U. S. C., §24, par. 7, as amended by the aforesaid Act of February 25, 1927, c. 191, §2, 44 Stat. 1226). It was sought to avoid the definite

prohibition contained in the statute by the claim that a quasi-contractual right could be based upon failure of consideration and also upon the theory of law which allows recovery where one party has been unjustly enriched at the expense of another. Neither theory prevailed.

The following language from the opinion of the court announces the doctrine which is equally applicable to the situation under discussion.

> "National banks are public institutions, and the purpose and effect of the statute is to protect their depositors and stockholders and the public from the hazards of contingent liabilities, attendant upon the assumption by the bank of the risk of loss by its customers, resulting from the permitted dealing in securities by the bank. The prohibition would be nullified and the evil sought to be avoided would persist, if, notwithstanding the illegality of the contract to repurchase, the buyer, upon tender of the bonds, could recover all he had paid for them. Such a construction of the statute is inadmissible."
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> *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209, 214.

The necessity of maintaining the integrity of statutes relating to banks and intended to protect depositors and stockholders and the public against the hazards of unauthorized contingent liabilities, no matter what form such liabilities may assume, has been invoked to defeat that part of a contract by a bank selling its own stock which obliged the bank to repurchase the shares.

In *Norwalk* v. *Marcus*, 235 App. Div. (N. Y.) 211, affirmed 261 N. Y. 615 (without opinion), the plaintiffs appealed from a judgment which held void and

unenforceable that portion of a contract by a bank to sell stock at a stated price which provided for the re-purchase thereof at said price at any time within one year. It was urged that the agreement to re-purchase "was merely a provision for the rescission of the entire contract pursuant to which the plaintiffs purchased the stock" and was therefore not illegal; "that the respondent's violation of the Banking Law, if it has been a violation, does not constitute a defense to this action; that the agreement was *ultra vires* and not illegal and therefore, the plaintiffs having performed on their part, the respondent is estopped from asserting its own lack of authority".

It was also contended "that there was a failure of consideration and, therefore, the appellants are entitled to recover; that the rights of the appellants were fixed prior to July, 1930, the date of the alleged insolvency of the respondent, and, therefore, the insolvency subsequent to the commencement of this action is immaterial".

In passing upon these contentions, the Appellate Division expresses views regarding the effect of the provisions of the Banking Law of the State of New York which, since the provisions are identical with those contained in the National Banking Act, make the opinion directly applicable to the present controversy.

> "The respondent says that the alleged contract of the bank to repurchase shares of its own stock is unenforcible. It is claimed that the repurchase by a bank of shares of its own capital stock is inherently vicious and, if permitted, would deprive the creditors of the bank of the statutory security furnished by the assessment liability of stockholders upon the insolvency of the bank and would result, in effect, in an unauthorized

reduction of its 'capital stock or permanent capital' which is carefully guarded from impairment by express provisions of the Banking Law. It is further contended that it would operate, in many instances, to impair the legal reserves of the bank and would weaken and impair or, perhaps, destroy the security of the depositors and creditors through what may be described as an investment in its own securities, which automatically become worthless upon the failure or insolvency of the bank. It is also argued that it would enable the board of directors and officers to repurchase and practically retire, with the bank's own funds, sufficient of its capital stock to perpetuate their tenure and control and thus lead directly to minority management without check or restraint by a financially interested and diversified body of stockholders and directors.

"In dealing with stock corporations generally, the Legislature has found it necessary, in the interest of the public, to declare invalid agreements by corporations to repurchase shares of their own stock except out of surplus. (*Topken, Loring & Schwartz, Inc.* v. *Schwartz,* 249 N. Y. 206; *Cross* v. *Beguelin,* 252 id. 262.)

"Recognition of a broader public interest in the financial soundness and stability of banking institutions is reflected in a sterner legislative policy which prohibits a bank from using its assets, including surplus, in the purchase of its own stock, unless necessary to prevent a loss upon a debt previously contracted in good faith.

"Section 108, subdivision 6, of the Banking Law provides in part:

'§108. * * * A bank subject to the provisions of this article * * *

'6. Shall not make any loan or discount on

the security of the shares of its own capital stock, or be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, * * *.'

"The absolute character of the prohibition is emphasized by the succeeding language of the same subdivision which provides: '* * * and stock so purchased or acquired shall be sold at public or private sale, or otherwise disposed of, within six months from the time of its purchase or acquisition. * * *'

"Adequate supervision and publicity of operations of banking institutions have long been the aim and the public policy of this State. The statute in question represents an effort in that direction. To uphold the transaction upon which this litigation is founded would largely reverse this policy and seriously augment the risks and dangers to the public inherent in the business of banking.

"The entire contract is not illegal. That part providing for the sale of stock to the plaintiffs is valid and may be enforced. This proposition appears to have been passed upon in *Hoover Steel Ball Co.* v. *Schaefer Ball Bearings Co.* (90 N. J. Eq. 164); *Atwater* v. *Stromberg* (75 Minn. 277); *Knight* v. *Jeff Davis Banking Co.* (31 Ga. App. 440; 120 S. E. 696); *Jackman* v. *Continental National Bank* (16 F. [2d] 728).

"The most direct holding on the subject will be found in *Hoover Steel Ball Co.* v. *Schaefer Ball Bearings Co.* (*supra*). That case involved the sale of stock by a New York corporation under which the corporation agreed to repurchase the stock within one year at the option of the purchaser. A demand to repurchase and a refusal by the corporation were alleged. Upon the in-

solvency of the corporation and the appointment of a receiver, a claim was filed on the agreement to repurchase and the refusal of the receiver to pay the claim was sustained on the authority of New York and New Jersey cases.

"At page 169 the court said: '"We think this contract is of the class where the valid provisions may stand unaffected by the invalidity of another provision, and where the law leaves the parties *pro tanto* where it finds them."'

"At page 168 of the same opinion the court said: 'The claim on the part of the appellant that if such contract is unenforcible as against the corporation, the consideration has failed, and that the purchaser is entitled to be repaid the amount paid for the stock because it is unfair that the corporation should retain it, is answered by the Supreme Court of Michigan in *McIntyre* v. *E. Bement's Sons* (146 Mich. 74), 109 N. W. Rep. 45, 47, in the following language: "But the promise of such a corporation to buy its own stock, if under any circumstances valid, must be considered as made and accepted with the understanding that the shareholder may not, in the face of insolvency of the company, change his relation from that of shareholder to that of creditor, escaping the responsibilities of the one and receiving the benefits of the other;" and by the Circuit Court of Appeals for the Sixth Circuit, in *Allen* v. *Commercial National Bank of Detroit* (191 Fed. 97) in the following language: "To hold that the contract with the corporation to repay is invalid, but that Allen may demand repayment because of the failure of the expected consideration, is to accomplish by indirection the forbidden result."'"

Norwalk v. *Marcus*, 235 App. Div. (N. Y.) 211, 212-214.

An attempt to require The Harriman National Bank and Trust Company of the City of New York to take back its own shares because purchased on misrepresentations was defeated in *Goess* v. *Ehret*, 13 F. Supp. 630 on the authority of the doctrine announced in the *Awotin* case. The language of the District Court is as follows:

> "Defendant purchased 100 shares of the stock of the bank on certain misrepresentations made by Harriman. These shares of stock sold to the defendant were sold out of the Harriman Securities Corporation's Suspense Account. The amount of the price was credited to the Securities Corporation.
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> "Defendant by way of relief requested that the bank take back the shares of its own stock and pay to the defendant the purchase price of these shares. This relief cannot be granted. *Awotin* v. *Atlas Exchange Nat. Bank*, 295 U. S. 209, 55 S. Ct. 674, 79 L. Ed. 1393.
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> "The bank was not permitted to sell the stock. If it attempted to do so, the person dealing with it would have no recourse for any loss that might occur. There can be no relief in this case."
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> *Goess* v. *Ehret*, 13 F. Supp. 630. For grounds of affirmance see *Goess* v. *Ehret*, 85 F. (2d) 109.

In *California Bank* v. *Kennedy*, 167 U. S. 362, this Court considered the power of a national bank to acquire 990 shares of stock of a savings bank with resultant liability as share-holder of the latter which had become insolvent. The question before the Court was thus stated by Mr. Justice White (p. 366):

> "1st, do the statutes of the United States, Rev. Stat. §5136, *et seq.*, relating to the organiza-

> tion and powers of national banks, prohibit them from purchasing or subscribing to the stock of another corporation? and, 2d, if a national bank does not possess such power, can the want of authority be urged by the bank to defeat an attempt to enforce against it the liability of a stockholder?"

After holding that "the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established", the Court found that "a national bank does not possess the power to deal in stocks" because "The prohibition is implied from the failure to grant the power." (pp. 366, 367). The Court also observed (p. 367):

> "On behalf of the plaintiff below it was admitted at the trial that the stock of the savings bank was not 'taken as security or anything of the kind,' and it is not disputed in the argument at bar that the transaction by which this stock was placed in the name of the bank was one not in the course of the business of banking for which the bank was organized."

Having found that dealing in stock was "entirely outside of the powers conferred upon the bank, and was in no wise the transaction of banking business or incidental to the exercise of the powers conferred upon the bank" (p. 370), the Court concluded that the California National Bank was not estopped by accepting stock dividends from asserting its want of authority to purchase the stock in defense of an action against it as a share-holder.

See also:

Concord First National Bank v. *Hawkins*, 174 U. S. 364;

Shaw v. *National German-American Bank*, 199 U. S. 603, affirming 132 Fed. 658;

First National Bank v. *Converse*, 200 U. S. 425;

Merchants' Nat. Bank v. *Wehrmann*, 202 U. S. 295.

We conclude our submission on this phase of the argument with the following observation. The powers of a national bank are measured by "the statutory grant; and powers not conferred by Congress are denied" (*Texas & P. R. R. Co.* v. *Pottorff*, 291 U. S. 245, 253). The sale of stock, and particularly of its own capital stock, by a national bank is not part of its regular business, and is permissible only in exceptional instances. It requires no further citation of authority to demonstrate that a national bank, limited in acquiring its own stock to the single instance of preventing loss upon a previously contracted debt, may not agree, upon selling its own stock, to rescind the sale and take back the stock if its value is not as represented. And as it cannot create by express contract a liability to take back its stock if the representations made are untrue, it would be strange, indeed, if it could be held to quasi-contractual liability by reason of the same representations. The policy of the law is not subservient to ritual.

> "That a defendant, who could not by contract lawfully relieve himself from liability as a stockholder, can accomplish that result by proof that it was fraudulently represented to him that he could so relieve himself, would be strange indeed."
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> *Upton* v. *Tribilcock*, 91 U. S. 45, 50.

POINT II.

The decision of the Circuit Court of Appeals is erroneous because it imposes liability upon the Bank for the misrepresentations of its officers in connection with the sale of shares of its corporate stock which were the property of the Harriman Securities Corporation, a separate company.

The stock sold to the plaintiff was owned by the Harriman Securities Corporation, a New York corporation organized for the purpose of purchasing, holding, selling and dealing in securities, and other investments (R. 90). The stock of the corporation was held by trustees, who were officers and directors of the Bank and each shareholder of the Bank had the "right to a beneficial interest through the Trustees in the capital stock of the Securities Company" (*do.*).

The Securities Corporation did "a large and substantial business in connection with securities of various kinds" (R. 37).

The district judge directed verdict for the Bank because it "was not enriched by reason of the sale of the Bank's stock to Mr. Oppenheimer" (R. 46).

Even if a contrary inference as to enrichment could have been drawn, the determination of the trial judge, to whom the drawing of inferences of fact was submitted by the motions for a directed verdict without request for leave to go to the jury, was conclusive.

> "Both sides moved for the direction of a verdict, and the trial judge became by consent the trier of the facts. If conflicting inferences were possible he chose those favorable to the plaintiff."
>
> *De Cicco* v. *Schweizer,* 221 N. Y. 431, 439.

In *Jaskow* v. *Harriman Nat. Bank & Trust Company,* 159 Misc. (N. Y.) 39, the plaintiff sued to recover the sum of $3,030 as damages by reason of his purchase of two shares of the stock of the Harriman National Bank and Trust Company from the Bank, claiming that such purchase had been induced by false representations made by a vice president of the Bank.

The trial judge found that the stock was purchased by the plaintiff in the belief that he was purchasing it from the Bank and not from the Harriman Securities Corporation and that the stock was purchased in reliance upon false and fraudulent representations made by persons who were officers of the Bank and also officers of the affiliate. Verdict was directed in favor of the defendants. From the opinion of the trial court, we quote the following:

> "Plaintiff contends that the sale was made by the bank as principal and that the bank received the proceeds or consideration thereof. On the record before me and within the period during which evidence as to the transactions was received, that is, from January to July, 1931, I reach the conclusion that the plaintiff has failed to sustain the burden of proof to establish that contention. * * *
>
> * * * * * * *
>
> "The purported sale of the stock by the bank and the representations by the persons who were bank officers in respect to the value of its shares were wholly unauthorized, and as against bank depositors and other creditors who concededly had nothing to do with the sale or the fraud in connection therewith, a bank stockholder should not on principle be allowed to recover, unless

the consideration of the sale passed to the bank itself. The receipt of the proceeds is the only conceivable ratification of the transaction by the bank and this is the basis on which plaintiff in his bill of particulars sought to establish such ratification.

"It can never be assumed that an officer of a national bank had authority to transact business in which the bank, by its charter (as restricted by the Banking Act), was expressly prohibited from engaging (*Alexander* v. *Cauldwell,* 83 N. Y. 480, 486). The prohibitions of the act are primarily for the security of national banking institutions, that is, for the protection of depositors and other creditors; and if the bank has not received the proceeds of the unauthorized transaction the loss should not be inflicted upon it with the consequent impairment of financial responsibility.

"It has been repeatedly held that a national bank, contracting beyond its powers, is not liable for anything beyond what is received (*Jackman* v. *Continental National Bank,* 16 F. (2d) 728; *Merchants Bank* v. *State Bank,* 10 Wall 604, and numerous other cases cited; U. S. Code Ann., tit. 12, Banks and Banking, §24, note 145). Assuming, therefore, that the bank, acting through its officers, did itself purport to sell the stock (instead of being a conduit through which the company sold it, as I find on this record), the public policy of the National Banking Act, aimed to protect depositors, would forbid recovery by a defrauded purchaser of the stock as against the bank, unless the bank, with the knowledge of the fraud, retained the proceeds of the sale.

* * * * * * *

"Plaintiff has, of course, a good cause of action against the individual officers who perpetrated

the fraud, but it is against them as individuals and not as officers of the bank."

Jaskow v. *Harriman Nat. Bank & Trust Co.*, 159 Misc. 39, 40-42.

The foregoing opinion by Justice Dore, was followed by the district judge in the instant case (R. 46).

To the same effect:

Heitman v. *Harriman*, 14 F. Supp. 282 (D. C., S. D. N. Y.).

Examination of the record in *Bradley* v. *Harriman National Bank & Trust Company of the City of New York*, 247 App. Div. 876, will disclose a state of facts similar to that in the *Jaskow* case. The memorandum by the Appellate Division is as follows:

"Action to recover $7,560 as damages for alleged fraud in the sale to plaintiff of five shares of stock of defendant bank. Judgment dismissing the complaint at the close of case unanimously affirmed, with costs. No opinion. Present—Martin, *P. J.*, McAvoy, O'Malley, Townley and Glennon, *J. J.*"

After affirmance by the Appellate Division, application was made to that court for leave to appeal to the Court of Appeals and was denied (248 App. Div. 564). Likewise, application to the Court of Appeals for leave to appeal was denied (271 N. Y. 663).

The foregoing decisions defeating attempts to charge this Bank with liability for the frauds of its officers proceed, as we have seen, on findings that the shares sold to the defrauded stockholders were not the property of the Bank, that the Bank was not enriched by the proceeds of the sales, and that the Bank's officers could not bind the Bank.

See also:

Farmers' State Guaranty Bank v. *Cromwell,* 70 Okla. 190, 173 Pac. 826; citing *U. S.* v. *Bank of Columbus,* 21 How. 356; Morse on Banks and Banking, 6th Ed., §132.

Since the Bank in the instant case, did not receive the avails of the sale of the stock, it is not chargeable with ratification of the transaction. Any liability on its part for the representations made by its officers must, therefore, rest upon the assumption, in which the Circuit Court of Appeals indulges, that the officers, because they were the selling instrumentalities, had authority to bind the Bank by any representations which they might make when the stock was sold.

We have urged, under the first point, that the Bank could not bind itself by such representations, since to permit it to do so would violate the cited sections of the law relating to Banks and Banking. But even if it were permissible for the Bank by an appropriate grant of actual authority to empower its officers to make representations binding the Bank, the mere fact that representations are made by the president or vice-president imports neither actual nor apparent authority to make them. Any other doctrine would be fraught with serious consequences to the creditors and stockholders of a bank.

Power to sell bank stock does not confer implied authority to warrant.

In *Smith* v. *Tracy,* 36 N. Y. 79, an attempt was made to charge the owner of bank stock with liability for the representations of the president of the bank with whom the owner had left the stock for sale. Judgment in favor of the plaintiff was reversed by the Court of Appeals on the ground that the presi-

dent of the bank had no authority to warrant the stock which the owner had empowered him merely to sell, the property, bank stock, being of a description not usually sold with warranty.

See also:

Cafre v. *Lockwood,* 22 App. Div. 11;
Oppenheimer v. *Irvin,* 166 App. Div. 233.

There is no reason for applying a different rule to representations than that which pertains to warranties. The elements which give rise to the right of rescission based upon false representations of fact are, in addition to the falsity, the materiality of the statement, intent that it should be acted upon, and action in reliance upon it with consequent injury. In all essentials such representation constitutes, by definition, an express warranty.

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."

N. Y. Personal Property Law, §93.

The same words, uttered in the same manner and under the same circumstances, constitute, if false, both a breach of warranty and a fraudulent representation, so far as concerns the right to rescind and recover what was paid on the rescinded transaction.

It would seem to follow, therefore, that no representation may be inferred when the right to warrant can not be implied.

POINT III.

The decision of the Circuit Court of Appeals is erroneous because it directs that a claim founded upon the fraud of national bank officers in inducing the person defrauded to purchase shares of the bank's stock shall participate in the proceeds of an assessment collected from the other shareholders.

The Bank is not a going concern. It is in receivership and, since March 3, 1933, has been insolvent (R. 34). The Comptroller of the Currency has levied an assessment against the stockholders in the full amount provided for by Title 12 U. S. C., §64 (R. 38-39).

The Circuit Court of Appeals has directed that plaintiff have judgment against the Bank for the amount demanded in the complaint "collectible out of the assets of the receivership after payment in full of all who were creditors when the said bank became insolvent" (R. 132-133).

The recovery so directed will of necessity come out of collections from the stockholders. It cannot come out of the assets of the Bank, since the Bank is insolvent. In substance and effect, the decision of the Circuit Court of Appeals makes the stockholders of the Bank liable to satisfy plaintiff's claim out of the assessment which they are required to pay.

We are now to inquire whether there is anything in Title 12, U. S. C., §64, providing for assessments on shareholders that justifies the ruling by the Circuit Court of Appeals. That section is as follows:

> "§64. *Individual liability of shareholder; transfer of shares.* The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and

> engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure (Dec. 23, 1913, c. 6, §23, 38 Stat. 273)."

Since the liability of the shareholders is imposed by the statute, anyone asserting a right to share in the proceeds of the assessment must prove that his claim is one for which the shareholders are responsible. Whether the liability imposed on the shareholders be regarded as statutory or contractual, certainly it may not include risks which neither the statute contemplated nor the stockholders have undertaken. The claim asserted by the plaintiff in this action is not a contract, debt or engagement of the Bank. It is not, therefore, within the compass of the statute creating the double liability of stockholders.

In *Clinton Mining & Mineral Co.* v. *Beacom,* 266 F. 621 (C. C. A. 3), petition for writ of certiorari denied, 254 U. S. 637, an action was brought by a judgment-creditor of a South Dakota corporation against a stockholder of that corporation to enforce

the stockholder's statutory liability for debts of the corporation. It was held that the defendant might go behind the judgment and if it had been obtained on a claim which was not comprised within the statutory liability the judgment-creditor could not recover against the stockholder because the latter's liability depended on the nature of the claim against the corporation on which the judgment was founded.

In that case there was no such statutory context as results from the use in Title 12, U. S. C., §64, of the word "debts" between "contracts" and "engagements", indicating, under the principle of *noscitur a sociis* that "debts" must be construed as obligations analogous to those arising out of contracts and engagements.

The language of the South Dakota statute was:

> "Each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him."

The judgment-creditor who sought to collect the statutory liability from the stockholder had recovered a judgment in an action of tort against the corporation in which the defendant held stock. The Circuit Court of Appeals, in affirming judgment of nonsuit, wrote as follows (p. 623):

> "In legal dictionaries defining the word 'debt', the consensus of definition is to give the technical meaning of certainty of amount as the earmark of a debt, and to contrast its specific promise by contract, with the uncertainty of general words such as 'obligation', 'liability', and the like. But not only does the word 'debt' carry with it the requirement of certainty, and the foundation of

promise by express contract, but it necessarily implies legality, since the basis of its obligation is legality based on promise and lawful consideration, and hence it will be seen that, a debt being in its nature certain, contractual, and lawfully incurred; it is reasonable that a statute should enact that a stockholder should be held liable for debts a corporation would properly and legally incur. From all of which it would clearly appear that both from the uncertainty and indefiniteness of uncontracted for liability, and from the illegality and wrong from which it arises, that a tort or wrong on the part of a corporation stands in a wholly different relation to a stockholder than does a debt with its certainty of contract and its legality of consideration.

"The corporation has no right to commit such tort or wrong. When the stockholder subscribed for its stock, it was not with the purpose of creating an agency that should commit a tort or wrong. Such acts were not incident to purposes for which it was formed, nor was the liability for such wrong which inured to the one wronged thereby, a right for which the latter bargained in the course of what the corporation was impliedly authorized by the stockholder to do. On the contrary, the wrong done was a wrong illegally done by the corporation, not only to the third party, but a wrong done equally and illegally to its stockholder. Such being the case, he who would make the word 'debt' in this statute a synonym for tort, and thereby impose liability on the stockholder, is giving the word 'debt' an effect which usage does not warrant nor reason justify. We are therefore of opinion that the tort of which the milling company was guilty in unlawfully mining the plaintiff's ore, was not a debt of the tort-feasor corporation, for which its stockholders were made personally liable by this statute."

See also

Chase v. *Curtis,* 113 U. S. 452;
Brown v. *Trail,* 89 Fed. 641;
Bohn v. *Brown,* 33 Mich. 257.

It is our submission that a claim founded upon the fraud of national bank officers in inducing the person defrauded to purchase shares of the bank's stock does not come within "contracts, debts, and engagements" within the meaning of Title 12 U. S. C., §64.

It is well established that the contracts, debts, and engagements referred to in the statute imposing double liability include only such contracts, debts, and engagements as have been duly contracted in the ordinary course of its business. It does not include any liability to satisfy a claim asserted after the bank has ceased to do business.

Richmond v. *Irons,* 121 U. S. 27;
Schrader v. *Manufacturers' Bank,* 133 U. S. 67.

Nor does it include any obligation resulting from a transaction which was *ultra vires* the bank.

Ward v. *Joslin,* 186 U. S. 142;
Close v. *Potter,* 155 N. Y. 145;
First National Bank v. *Ocean National Bank,* 60 N. Y. 278.

In *Assets Realization Co.* v. *Howard,* 70 Misc. (N. Y.) 651 (affd. 152 App. Div. 900, for grounds of affirmance in Court of Appeals, see 211 N. Y. 430), the court said (p. 671):

> "The rules of law laid down and enunciated in the above cases,* so far as we have been able to discover, have nowhere been questioned. They

* *Ward* v. *Joslin,* 186 U. S. 142, and *Close* v. *Potter,* 155 N. Y. 145, *supra,* among others.

are founded in common sense and supported by the best of reasons.

"Corporate officers are but the agents of the corporation and, in a sense, of the stockholders, whose capital is invested in the enterprise. They get their authority to act and bind the corporation and its stockholders from the statute which authorizes the corporate existence. When the directors or officers of a corporation go beyond the powers and authority conferred, they cease to represent the stockholders, and their acts ought not to create any liability on the stockholder for such *ultra vires* transactions."

It is settled law in England that no shareholder of a corporation who has been induced to purchase his shares by the fraud of its officers may, after it has become insolvent and gone into liquidation, either rescind his purchase or maintain an action for damages for the deceit. The reason is that in either case his recovery must come out of the contributions of the other shareholders who are equally innocent of the fraud.

The Companies Act, 1862 (25 and 26 Victoria, p. 614), contained a provision, Section 38, that made every present and past member of a company formed under the act liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities. The City of Glasgow Bank was incorporated under the Companies Act, 1862. One Houldsworth purchased £4,000 of the bank stock from the bank itself in February, 1877, at the price of £9,000. He was registered and received dividends. The bank went into liquidation in October, 1878, with immense liabilities and Houldsworth, as did the respondent in the case at bar, paid an assessment. He brought an action against the liquidators (cor-

responding to the receiver under our system) to recover damages in respect of the sums he had paid originally for the stock and on the first call by the liquidators, and in respect of the estimated future calls. He founded his claim upon the ground of fraudulent misrepresentations made by the directors and other bank officials to him. The Court of Session in Scotland dismissed his action. He appealed to the House of Lords. The House of Lords affirmed the judgment. The following are from the opinions of the Law Peers:

> "Such an action of damages as the present is really not against the corporation as an aggregate body, but is against all the members of it except one, viz., the Pursuer; it is to throw upon them the Pursuer's share of the corporate debts and liabilities. Many of those shareholders (as was observed by Lord Cranworth in *Addie's Case* [L. R. 1 H. L., Sc. 145]) may have come and probably did come into the company after the Pursuer had acquired his shares. They are all as innocent of the fraud as the Pursuer himself; if it were imputable to them it must, on the same principle, be imputable to Pursuer himself as long as he remains a shareholder; and they are no more liable for any consequences of fraudulent or other wrongful acts of the company's agent than he is. Rescission of the contract in such a case is the only remedy for which there is any precedent, and it is in my opinion the only way in which the company could justly be made answerable for a fraud of this kind. But for rescission the Appellant is confessedly too late."
>
> Lord Selborne in *Houldsworth* v. *City of Glasgow Bank and Liquidators*, 5 App. Cas. 317, 329-30.

The very relief granted to the respondent in the instant case by the Circuit Court of Appeals was suggested in the lower court in the *Houldsworth* case and is thus dealt with by the Lord Chancellor (Earl Cairns):

> "It appears to have been contended in the Court below that the Appellant might be unable to maintain the present action as a claim in the liquidation to be satisfied *pari passu* with other creditors, and yet might be able to maintain it as a claim against the company or against shareholders in the company after all other creditors were satisfied. In the argument at your Lordships' Bar I think it was felt to be impossible to maintain this theory of a deferred or secondary right of action against the company. I am satisfied there is no foundation for it. *The Winding-up Act* has no provisions for the payment of claims against the company except the claims of creditors. Creditors are supposed to be paid *pari passu,* and there is no provision after they are paid for opening up fresh claims by a contributory against the company. There are, indeed, provisions which, after the debts are paid, enable any inequalities in the contributions of the contributories to be set right, but that is quite a different matter."
>
> *Houldsworth* v. *City of Glasgow Bank and Liquidators,* 5 App. Cas. 317, at page 323.

At the beginning of the Lord Chancellor's opinion, he dealt with the fundamental question whether there could be repudiation of the stock after insolvency:

> "It was admitted before your Lordships, as indeed it could not be denied, that after the

winding-up of the company commenced it was too late for the appellant to repudiate his stock, and that he must remain, as the liquidation found him, a partner in the bank and a contributory as such" (do., pp. 322-323).

In the same case, Lord Hatherley expressed views on a situation with which the court was there concerned in all respects analogous to that involved in the instant case as follows:

"In truth the appellant is trying to reconcile two inconsistent positions, namely, that of shareholder and that of creditor of the whole body of shareholders including himself. As has been observed already by those of your Lordships who have preceded me, amongst the various cases which have been brought before the Courts in respect of dealings with joint stock companies, no case can be adduced in which a person so claiming to be a shareholder has at the same time successfully asserted his claim against a company in liquidation for such a debt as this, namely one in which he is himself a co-debtor with all his fellow shareholders to himself, and is himself in common with them responsible again to them individually for like liabilities irrespective of representations made by their common agent" (do., pp. 333-4).

The principle stated in the *Houldsworth* case, *supra,* was applied by Sir George Jessel, Master of the Rolls, in *Re Hull and County Bank, Burgess's Case,* 15 Ch. Div. 507. There, a shareholder of a bank who had been induced by fraudulent misrepresentations contained in the prospectus to apply for shares attempted to rescind his contract and recover the sum paid for the shares after the bank had gone into liquidation.

The Master of the Rolls, holding that such a claim might not be successfully asserted, said (p. 512):

> "Now, the other shareholders are as innocent of this fraud as the applicant. There is no pretense for saying that they authorized the committal of it; on the contrary, they themselves were defrauded in like manner. Therefore, they acquired rights as innocent parties under the 38th section which this applicant seeks to take away from them. It is quite true that in *Oakes* v. *Turquand** the only persons whose rights were decided upon were creditors, but the rights of other persons equally innocent were not required to be considered, because there was not enough to pay the creditors.
>
> "In this case, however, it is said that the assets of the company contributed by the other shareholders are sufficient to pay the creditors in full and all costs, and, therefore, that, the creditors having been paid or provided for, those rights are not to be considered; but, as I said before, the other contributories are also innocent persons, and have acquired rights, and I see no reason why those rights should not be considered."

The Master of the Rolls further said (pp. 513-514):

> "Therefore, if you have paid for your shares, and your payment has been applied in the payment of creditors, and the other contributories have not fully paid, they being equally innocent, you would be entitled on that theory to claim back the sum you had paid, and to have it paid you by a call on the other contributories. Of course that would not be enforcing the adjustment of the rights of the contributories amongst themselves, because, as I said before, these other

* L. R. 2 H. L. 325.

contributories are not the persons who committed the fraud, and they are not liable, and, consequently, if you cannot have total rescission of the contract, it is plain you cannot have partial rescission either, and the claim must wholly fail."

See also:

East Broken Hills Consols., Ltd. v. *Mallaby-Deeley,* 11 T. L. R. 241, affd. id. 245.

It was error for the Circuit Court of Appeals to order that the plaintiff's claim should participate in the proceeds of an assessment collected from the shareholders.

POINT IV.

Plaintiff is barred after insolvency from rescinding his purchase of bank stock and particularly, as the rights of subsequent creditors have intervened.

Plaintiff purchased his stock in November, 1930 (R. 3). He received three semi-annual dividends thereafter (R. 15). Between the time of the purchase of his stock and the closing of the Bank new creditors came into the Bank in an amount exceeding $10,000,000 (R. 34), who have not been paid in full (R. 38). He did not attempt to rescind until May, 1933 (R. 18, 51-2), some months after the Bank had become insolvent and was closed (R. 34).

These facts bring the case within the rule stated by Sanborn, *C. J.* writing for the Circuit Court of Appeals, Eighth Circuit, in *Ratcliff* v. *Clendenin,* 232 Fed. 61, as follows (p. 64):

"A stockholder who is induced by fraud to purchase the stock of a corporation, and who for

> years, while the corporation is a going concern and is incurring debts to creditors, which still exist, receives dividends or income from his purchase of the stock, is estopped, after the corporation becomes insolvent, has ceased to be a going concern, and is adjudged a bankrupt, from rescinding his purchase of the stock against a protest of its creditors [Citing numerous authorities]."

So, in *Bittenbender* v. *Cosmopolitan Trust Co.*, 253 Mass. 230, 148 N. E. 619, the Supreme Judicial Court of Massachusetts, by Chief Justice Rugg denied the claims of a defrauded stockholder of a bank, made after the insolvency of the bank, to be relieved from liability on his stock and to establish a constructive trust for the moneys paid by him, saying that although he could have had his remedy "while it was a going concern or before the rights of third persons had supervened, * * * at least to the extent of setting aside his subscriptions to stock on the ground of fraud and recovering the money he had paid", the commissioner of banks having taken possession of the company "the situation now has changed in a decisive particular" and the plaintiff "cannot establish a debt nor gain any priority as to funds in the hands of the commissioner of banks in possession of the trust company for purposes of liquidation."

In *Palmer* v. *Citizens' Bank of Murray*, 179 Ky. 54, 200 S. W. 41, the Court of Appeals of Kentucky said, of the rights of a defrauded stockholder:

> "He cannot obtain relief if the action is not commenced until the corporation has become insolvent, or until proceedings have been instituted for the liquidation of its affairs, unless he had become a stockholder so recently before

> the insolvency that he had not had reasonable time or opportunity to investigate its affairs and discover the fraud, and had not received any dividend or other return for his investment in the stock."

The Court further said that the reason for that rule was that, after insolvency of the company, the stockholder's

> "attempt to secure a rescission or damages for the fraud, which had been perpetrated upon him, would affect the rights of the creditors of the institution."

See also:

Wilson v. *Hundley,* 96 Va. 96, 30 S. E. 492;
Duffield v. *E. T. Barnum W. & I. Works,* 64 Mich. 293, 31 N. W. 310;
Farrar v. *Walker,* Fed. Cas. 4679.

POINT V.

Plaintiff is not entitled to a claim payable ratably with the claims of depositors and other creditors of the Bank.

The Circuit Court of Appeals, in the instant case, has permitted the plaintiff to rescind his purchase as against the corporation, but postponed payment of his claim until after payment in full of all who were creditors when the Bank became insolvent (R. 115-116).

Although the Circuit Court of Appeals should not have allowed any rescission either as against creditors or the other stockholders, it is our submission that if rescission is to be allowed against the corporation, the Circuit Court of Appeals was right in sub-

ordinating the claim of plaintiff to the claims of depositors and other creditors of the Bank.

The Circuit Court of Appeals declined to follow *Salter* v. *Williams,* 244 F. 126, where a defrauded stockholder was permitted to share *pari passu* with depositors in the distribution of a bank's assets in liquidation. "Obviously, one who is liable to such creditors as a stockholder for assessment can neither reduce the amount he has paid as assessment nor come in to share assets he is bound to leave to the prior satisfaction of those creditors. In so far as *Salter* v. *Williams,* 244 F. 126 (C. C. A. 3), teaches the contrary, it overlooks the necessary implication of the liability statute in the case of insolvent national banks and we cannot follow it" (R. 116).

The cogent public policy responsible for the enactment of 12 U. S. C. §64 imposing double liability on the shareholders of a national bank is reflected in the decision under appeal which seeks to guard the sacredness of the additional security afforded depositors, and it is realized that the conscious assumption of the statutory liability by the stockholder would be nullified by permitting him to share *pari passu* with the depositors.

The *Salter* case proceeds on the principle that Salter acquired the status of a creditor immediately upon the purchase of his shares. Thus the court stated that his right to rescind "was fixed by the fraud of the bank when the fraud was practiced", and that, therefore, he "approached the Receiver like an ordinary creditor whose claim was contracted before receivership" (244 F. 126, 130). A purchaser of stock who has not rescinded his purchase is not a creditor with a claim for the return of his money. Assuming that the transaction may be rescinded, the pur-

chase is voidable, not void. The purchaser may elect to rescind. He may not elect to rescind. He does not assume the status of creditor until he terminates his status of stockholder by exercising his election to rescind. Indeed, there is authority for the proposition that he does not become a creditor until his right to rescind has been adjudicated (*In re Harmony Creamery Co.,* 18 F. [2d] 609 [D. C. Pa.]), and it is indicated that he is entitled to interest on his claim only from the date of rescission (*Davis* v. *Louisville Trust Co.,* 181 Fed. 10, 23; *Hunsicker* v. *Gilham,* 163 La. 651, 112 So. 518; *Knight* v. *Bentel,* 39 Cal. A. 502, 179 Pac. 406).

The action for money had and received being quasi-contractual, based upon a promise implied in law (*Cary* v. *Curtis,* 3 How. 236, 250), it may be correct to say that the cause of action is based upon an implied contract made at the time of the sale. It by no means follows, however, that plaintiff's claim for the return of his money antedated insolvency. In the case of express contracts made before insolvency, it is well settled that claims for damages for non-performance may not share in the assets of the receivership where they do not mature until after insolvency.

In *Pink, as Superintendent of Insurance of the State of New York* v. *Harriman National Bank & Trust Company,* 247 App. Div. [N. Y.] 387, plaintiff asserted a claim in the liquidation of the Harriman Bank. The claim was for reimbursement for certain expenses incurred by a defunct insurance company in defending actions upon bonds issued to secure deposits in the bank. It was based upon an agreement made by the bank to save the insurance company harmless from any such expenses. The agreement was made before the bank became insolvent but the expenses were not incurred by the insurance

company until after insolvency. The Appellate Division of the Supreme Court, First Department, held that the claim was not entitled to share in the assets of the receivership. The court said (247 App. Div. [N. Y.] 387, at p. 389):

> "It is well settled that the only claims entitled to allowance in the liquidation of a national bank are those in existence on the date of the insolvency. In *Citizens' Bank & Trust Co.* v. *Thornton* (174 Fed. 752) the defendant was the receiver of a national bank. The bank had indorsed a promissory note which contained an agreement to pay costs and disbursements, including attorneys' fees, in litigation brought to enforce it. The note matured after the insolvency of the bank, and plaintiff sued the receiver. Plaintiff attempted to include in the judgment the costs of litigation, including attorneys' fees. The court held that this could not be done. (See, also, *Dunnagan* v. *Best,* 59 F. [2d] 795; *White* v. *Knox,* 111 U. S. 784; *Merrill* v. *National Bank of Jacksonville,* 173 id. 131.) The same rule has been established in the liquidation of New York State banks. (*Varick Spring Corp.* v. *Bank of United States,* 264 N. Y. 297.) Applying this principle to the facts herein, it is clear that the claim was rightly disallowed as one not matured at the date of insolvency."

The claim of a shareholder, who does not rescind his purchase until after insolvency, falls, we submit, within the same category. His claim does not come into existence until he elects to terminate his status of stockholder and assume, in substitution thereof, the status of creditor.

Moreover, the Circuit Court of Appeals was correct in deciding that the assessment statutes (12 U. S. C., §§ 64, 191, 192) by necessary implication, require the

denial of any relief in favor of the present plaintiff and against depositors and creditors of the bank. Plaintiff concedes that he remained liable for the assessment and he does not claim any right to a return of the assessment which he has paid. But the liability for assessment arises only if the individual assessed was a stockholder on the date of insolvency. Liability for assessment and right of rescission involve, therefore, a contradiction in terms. If a shareholder can obtain the return of his money upon the ground that he never properly became a stockholder, the conclusion would seem to be inescapable that he could, on the same basis, resist the assessment. *Merrill* v. *Florida Land & Improvement Company,* 52 F. 77, and 60 F. 17, carried the right of rescission to its logical conclusion by deciding that an injunction should issue against the collection of the stock assessment. It will scarcely be urged, however, that the decision was correct. *Scott* v. *De Weese,* 181 U. S. 202, and *Lantry* v. *Wallace,* 182 U. S. 536, foreclose further discussion of that question.

Plaintiff urges that he rescinded his purchase before the insolvency of the bank. The argument (Brief, pp. 8, 11, Point II [pp. 32-36]) is based upon two assertions, (1) that the concession of insolvency on March 3, 1933 (R. 34, 38) referred merely to insolvency in the sense of inability to pay debts as they matured on that day (implying that the kind of insolvency which bars the right of rescission is insolvency in the sense of an excess of liabilities over assets) and (2) that the right to rescind is not affected until the official declaration of insolvency implicit in the appointment of a receiver on October 16, 1933.

Although the record (R. 34, 38) does not substantiate the attempted qualification of the concession as to insolvency on March 3, 1933, it is unnecessary to

labor this phase of the argument. A conservator was appointed for the bank on March 13, 1933. The Bank Conservation Act (Title II of Act of March 9, 1933, c. 1, §203, 48 Stat. 2, 12 U. S. C. §203) provides:

> "Sec. 203. Whenever he shall deem it necessary in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, the Comptroller of the Currency may appoint a conservator for such bank and require of him such bond and security as the Comptroller of the Currency deems proper. The conservator, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such bank, and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law. Such conservator shall have all the rights, powers, and privileges now possessed by or hereafter given receivers of insolvent national banks and shall be subject to the obligations and penalties, not inconsistent with the provisions of this title, to which receivers are now or may hereafter become subject. *During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto shall, subject to the other provisions of this title, be the same as if a receiver had been appointed therefor.* All expenses of any such conservatorship shall be paid out of the assets of such bank and shall be a lien thereon which shall be prior to any other lien provided by this Act or otherwise. The conservator shall receive as salary an amount no greater than that paid to employees of the Federal Government for similar services." (Italics ours.)

No other provision in the title relates to the subject matter here in controversy.

It may further be noted that a bank differs from other corporations and individuals in so far as the status of insolvency is concerned. Other corporations and individuals are insolvent only when their assets are insufficient to meet their liabilities (under the bankruptcy laws), whereas banks are considered insolvent when they are unable to meet their current liabilities and the demands of customers over the counter in the ordinary course of business, notwithstanding there may be frozen assets which, together with other resources, may equal the liabilities. As stated in *Steele* v. *Randall,* 19 Fed. (2d) 40-41, "when the bank could not meet its obligations as they became due it was insolvent". (See also *Roberts* v. *Hill,* 24 Fed. 571, 573; *U. S.* v. *Oklahoma,* 261 U. S. 253, 261). It follows that the date of the appointment of the receiver was immaterial. (*Yardley* v. *Philler,* 167 U. S. 344; *Steele* v. *Randall, supra.*) Knowledge, intention, or motive on the part of the creditor is immaterial. *National Security Bank* v. *Butler,* 129 U. S. 223; *Roberts* v. *Hill, supra.*

Finally, a judgment admitting the claim of a defrauded shareholder to an equal ranking with the claims of depositors would seem to contravene the expressed solicitude of Congress for the claims of depositors of insolvent national banks. Congress, desiring to preserve from depletion the assets necessary to pay *depositors,* has provided that claims of the United States for taxes may not be asserted if the effect will be to diminish the assets necessary for the full payment of all depositors (12 U. S. C. Section 570, Act of March 1, 1879, c. 125, Section 22, 20 Stat. 351).*

"The act of 1879, divested of words not necessary to the consideration of this case, provides that when a bank has stopped business because of insolvency no tax shall be paid into the Treasury which shall diminish the assets 'necessary for the full payment of all its depositors', and such tax shall be abated from insolvent banks. No ambiguity appears in the statute; the taxes not to be paid are those only which shall diminish assets necessary to pay depositors; and the word 'such' in the concluding clause relates to the definition of the preceding clause, that is to those taxes, and to those only, whose payment will diminish the depositors' fund. This interpretation of the act has already been, in effect, given it in Johnston's Case, where the court says (p. 172):

> " 'The act of March 3, 1879, now under consideration, was passed for the undoubted purpose of relieving depositors in national banks from the payment of certain taxes not assessed upon them, but upon the banks of which they are only customers—taxes which, under the pre-existing law, they would indirectly be obliged to pay when a bank is so insolvent that all its capital is gone,

* Set forth in full in Appendix E herein, page 54.

and it has nothing left with which to pay taxes except the money of its depositors. These semi-annual taxes are assessed against national banks in their corporate capacity, upon their capital and business, in consideration of the franchise and benefits which the government grants to them, and for other reasons. They are expected to come out of the profits of the bank, and thus, reducing the dividends of the stockholders, they are a tax upon the proprietors of the institution.'

"It was clearly the intention of the statute to relieve the innocent customers of the bank, between whom and the government there were no relations of tax-payer and tax-receiver, and not to relieve the owners of the institution from their just liabilities."

Jackson, Receiver v. *United States,* 20 Ct. Cl. 298, at 304.

CONCLUSION.

Wherefore, it is submitted that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

MARTIN CONBOY,
Counsel for The Harriman National Bank and Trust Company of the City of New York.

GEORGE P. BARSE,
JOHN F. ANDERSON,
Attorneys for the Comptroller of the Currency,
Of Counsel.

APPENDICES.

A.

12 U. S. C., §51.

§51. *Requisite of capital and surplus.* After June 16, 1933, no national banking association shall be organized with a less capital than $100,000, except that such associations with a capital of not less than $50,000 may be organized in any place the population of which does not exceed six thousand inhabitants. No such association shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than $200,000, except that in the outlying districts of such a city where the State laws permit the organization of State banks with a capital of $100,000 or less, national banking associations now organized or hereafter organized may, with the approval of the Comptroller of the Currency, have a capital of not less than $100,000. No such association shall hereafter be authorized to commence the business of making until it shall have a paid-in surplus equal to 20 per centum of its capital: *Provided,* That the Comptroller of the Currency may waive this requirement as to a State bank converting into a national banking association, but each such State bank which is converted into a national banking association shall, before the declaration of a dividend on its shares of common stock, carry not less than one-half part of its net profits of the preceding half year to its surplus fund until it shall have a surplus equal to 20 per centum of its capital: *Provided,* That for the purposes of this section any amounts paid into a fund for the retirement of any preferred stock of any such converted State bank out of its net

earnings for such half-year period shall be deemed to be an addition to its surplus fund if, upon the retirement of such preferred stock, the amount so paid into such retirement fund for such period may then properly be carried to surplus. In any such case the converted State bank shall be obligated to transfer to surplus the amount so paid into such retirement fund for such period on account of the preferred stock as such stock is retired. (As amended Feb. 25, 1927, c. 191, §4, 44 Stat. 1227; June 16, 1933, c. 89, §17 (a), 48 Stat. 185; Aug. 23, 1935, c. 614, §309, 49 Stat. 709.)

B.

12 U. S. C. §51c.

§51c. *"Common stock," "capital" and "capital stock" defined.* The term "common stock" as used in sections 51a to 51d of this title means stock of national banking associations other than preferred stock issued under the provisions of sections 51a to 51d of this title. The term "capital" as used in provisions of law relating to the capital of national banking associations shall mean the amount of unimpaired common stock plus the amount of preferred stock outstanding and unimpaired; and the term "capital stock", as used in sections 101 and 177 of this title, shall mean only the amount of common stock outstanding. (Mar. 9, 1933, c. 1, §303, 48 Stat. 5.)

C.

12 U. S. C. §53.

§53. *When capital stock paid in; installments; proof.* At least 50 per centum of the capital stock of

every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in installments of at least 10 per centum each, on the whole amount of the capital, as frequently as one installment at the end of each succeeding month from the time it shall be authorized by the Comptroller of the Currency to commence business; and the payment of each installment shall be certified to the comptroller, under oath, by the president or cashier of the association. (R. S. §5140.)

D.

12 U. S. C. §54.

§54. *Failure to pay installments; remedy; effect if reduction of capital results.* Whenever any shareholder, or his assignee, fails to pay any installment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or, if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the

directors may order, within six months from the time of such forfeiture, and if not sold it shall be canceled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section 192 of this title, to close up the business of the association. (R. S. §5141.)

E.

12 U. S. C. §570.

§570. *Insolvent Banks as Exempt from Tax.* Whenever and after any bank has ceased to do business by reason of insolvency or bankruptcy, no tax shall be assessed or collected, or paid into the Treasury of the United States, on account of such bank, which shall diminish the assets thereof necessary for the full payment of all its depositors; and such tax shall be abated from such national banks as are found by the Comptroller of the Currency to be insolvent; and the Commissioner of Internal Revenue, when the facts shall so appear to him, is authorized to remit so much of said tax against insolvent State and savings banks as shall be found to affect the claims of their depositors. (Mar. 1, 1879, c. 125, §22, 20 Stat. 351.)

SUPREME COURT OF THE UNITED STATES.

Nos. 588, 670.—October Term, 1936.

588 Henry E. Oppenheimer, Petitioner, *vs.* The Harriman National Bank and Trust Company of the City of New York, et al.

670 The Harriman National Bank and Trust Company of the City of New York, Petitioner, *vs.* Henry E. Oppenheimer.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 26, 1937.]

Mr. Justice Butler delivered the opinion of the Court.

For some years prior to the occurrences out of which this litigation arose the defendant bank was doing business in New York City. Being unable to meet current demands, it closed March 3, 1933. March 13 a conservator was appointed;[1] October 16 the comptroller declared it insolvent and appointed a receiver.[2] Later, he assessed the stockholders par value of their stock.[3] May 31, Oppenheimer brought this action in the federal court for the southern district of New York to recover damages upon an executed rescission of a sale to him of stock of the bank by means of fraudulent representations made by its president and vice president. At the close of the evidence, the parties respectively sought a directed verdict, and, no request for submission of any issue to the jury having been made,[4] the court found the bank not enriched by the sale, and the president and vice president without actual or apparent authority to make representations

[1] 12 U. S. C., § 203.

[2] 12 U. S. C., § 191.

[3] 12 U. S. C., §§ 63, 64; see also § 192.

[4] Beuttell v. Magone, 157 U. S. 154, 157. Empire State Cattle Co. v. Atchison Ry. Co., 210 U. S. 1, 8. Sena v. American Turquoise Co., 220 U. S. 497, 498. Am. Nat'l Bank v. Miller, 229 U. S. 517, 520. Williams v. Vreeland, 250 U. S. 295, 298.

in connection with the sale, directed a verdict and entered judgment for the bank. The Circuit Court of Appeals reversed and ordered that judgment for the amount demanded in the complaint be entered against the bank collectible out of assets of the receivership after payment in full of all who were creditors when the bank became insolvent. 85 F. (2d) 582.

Plaintiff applied for a writ of certiorari contending that the Circuit Court of Appeals erred in holding that his judgment is not entitled to rank with other unsecured creditors' claims and that its ruling conflicts with decisions of other Circuit Courts of Appeals.[1] Defendant presented its cross petition asserting that the court erred in holding: that plaintiff is entitled to participate in the distribution of proceeds of assessments on stockholders collected under 12 U. S. C., § 64; that it may be compelled to take and pay for shares of its own capital stock in a manner not authorized by 12 U. S. C., § 83; that it is liable for fraud of its officers in connection with the sale of shares which were the property of another, the bank not being enriched by the transaction; and that plaintiff is entitled to judgment against defendant. This court granted both petitions.

November 1, 1930, plaintiff purchased 10 shares of the bank's stock for $15,120. He was induced to buy the stock by false and fraudulent representations of the president and vice president of the bank. It sent him a bill for the purchase price. Having considerably more on deposit in the bank, plaintiff sent his check for that amount drawn on it and payable to its order. A vice president acknowledged receipt of the check and sent plaintiff a stock certificate for the shares purchased. His check marked paid and the bill receipted were returned to him. Plaintiff received dividends on the stock amounting to $525 and sold two shares for $2,408. Later, May 6, 1933, he gave the bank notice of rescission, tendered it the certificate and demanded that his account be credited with the amount of his payment less the sums he had received as dividends and from the sale of the two shares. The bank rejected his demand; he brought this suit for $12,187 with interest and costs. In addition to a general denial, defendant's answer set up

[1] Salter *v.* Williams (C. C. A. 3rd) 244 Fed. 126, 129. Florida Land & Imp. Co. *v.* Merrill, (C. C. A. 5th) 52 Fed. 77, 80; Merrill *v.* Florida Land & Imp. Co., 60 Fed. 17. Williams *v.* Green, (C. C. A. 4th) 23 F. (2d) 796, 797. Clark *v.* Boston-Continental Nat. Bank, (C. C. A. 1st) 84 F. (2d) 605, 607. And see Lantry *v.* Wallace, 182 U. S. 536, 555.

affirmative defenses of ratification after knowledge of the fraud and of laches but at the trial these were abandoned.

Defendant's evidence tended to prove that the stock was not owned by it but by Harriman Securities Corporation, the shares of which were held in trust for the benefit of the stock of the bank. The bank maintained in its bond department a "suspense account" in which were reflected purchases and sales of its own stock made by it for account of that corporation. The bank lent the affiliate the sums required for purchasing the stock and the amounts were charged to the latter. When the stock was sold the proceeds were credited to the affiliate. Stock so purchased was taken in the name of Kelly, an employee of the bank, as nominee of the affiliate. The shares in question were so held. Of the amount paid by plaintiff $100 was retained by the bank as its commission for making the sale; the balance was entered in the suspense account. Plaintiff had no knowledge of any transactions between the bank and its affiliate; he believed he was dealing with the bank as principal. He has paid the assessment that the comptroller made against him as stockholder and has not challenged its validity or sought repayment of any part of it.

1. Defendant maintains that a national bank may not incur liability to retake shares of its stock sold by it either as principal or agent.

It cites provisions of Title 12, U. S. C., governing national banking associations the substance of which follows. Section 24 (Seventh) limits the business of dealing in securities and stock to purchasing and selling without recourse. Section 56 prohibits withdrawal of capital by dividends or otherwise. Section 59 permits reduction of capital by vote of two-thirds of the stock. Section 83 declares that no such association shall make any loan or discount on the security of its own capital stock nor be a purchaser or hold its shares unless the security or purchase shall be necessary to prevent loss upon a debt previously contracted; it requires that the stock so obtained shall be sold within six months.

Defendant suggests that, save as otherwise definitely authorized, these provisions require that the outstanding stock of a national bank shall not be reduced while its banking operations continue. On that basis it maintains that to enforce rescission would in effect allow a national bank to repurchase its stock and so to accomplish by indirection what it may not do directly.

The bank had power to sell the stock in question whether acquired by it in accordance with or contrary to § 83,[6] and whether the stock belonged to it, the affiliate or a third party.[7] As the stock was fully paid in when originally issued, recovery by the plaintiff would not violate statutory provisions prohibiting reduction of capital.[8] It is to be remembered that plaintiff has fully paid his statutory liability. The bank's liability does not differ from what it would be if, instead of shares of its own stock, it had fraudulently sold to plaintiff bonds or other investment securities.[9] It cites § 24 (Seventh) as construed in *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209. But that decision does not support its contention. There the bank sold bonds and in connection with the sale agreed with the buyer that at maturity it would repurchase at par value and accrued interest. We held the agreement repugnant to § 24 (Seventh) requiring sales to be without recourse. The sale was a valid executed contract; the bank's promise to repurchase was forbidden by law and therefore void. The purchaser, chargeable with knowledge of the statute, could not invoke estoppel. The statutes relied on by defendant cannot reasonably be construed to forbid rescission of fraudulent sales by national banks of their own stock. In the absence of language unquestionably disclosing that purpose, Congress may not be held to have so intended. There is no evidence of that intention. Defrauded purchasers may rescind fraudulent sales by national banks of their own capital stock.

2. Defendant maintains that it may not be held liable for misrepresentations made by its officers when making the sale to plaintiff. It does not challenge the authority of its president or vice president to act for it in making sales of investment securities or stock. Through them it represented to plaintiff that the shares offered him belonged to an estate, made the sale, obtained his check for the purchase price, took the amount from his deposit, issued and sent him a stock certificate. If, as it claimed at the

[6] Lantry v. Wallace, 182 U. S. 536, 553. Scott v. Deweese, 181 U. S. 202, 211. National Bank of Xenia v. Stewart, 107 U. S. 676. National Bank v. Matthews, 98 U. S. 621, 629.

[7] 12 U. S. C. § 24 (Seventh). Awotin v. Atlas Exchange Bank, 295 U. S. 209, 212.

[8] Salter v. Williams, 244 Fed. 126, 130.

[9] Cf. Nat. Bank & Loan Co. v. Petrie, 189 U. S. 423, 425.

trial, the shares belonged to its affiliate, the latter was an undisclosed principal, and plaintiff was entitled to look to the bank as if it acting for itself.[10] It is immaterial whether, as between the bank and its affiliate, the amount obtained from plaintiff belonged to the former or was received by it as agent for the latter.

3. Defendant maintains that the proceeds of assessments may not be charged with the claim of a rescinding shareholder.

It argues that, the bank being insolvent and in receivership, the recovery cannot be had from the assets of the bank and will of necessity come out of the money paid by shareholders. It calls attention to § 64 which declares that stockholders shall be held individually responsible for all "contracts, debts, and engagements" of the bank.

But that contention misconstrues the judgment directed below. It is to be "collectible out of the assets of the receivership after payment in full" of others. Manifestly the assets referred to are not limited to assessments collected from stockholders but include assets passing from the bank to the receiver. The phrase quoted from § 64 relates to the liability of stockholders enforceable upon finding of insolvency, appointment of receiver and assessment by the comptroller, and not to provability or rank of claims. His determination as to the necessity and amount of assessments against shareholders is conclusive upon them and immune from collateral attack.[11] The bank may not in this suit invoke the rights of stockholders to defeat plaintiff's claim against it.

Moreover, the quoted provision was enacted for the protection of the public dealing with national banks and should be reasonably construed in favor of claimants against them. To give full effect to the purpose of Congress a liberal construction is required. A technical or narrow view would be inconsistent with the true intent and meaning of the measure. There is nothing in the purpose or context of the statute to detract aught from the significance that fairly may be attributed to the words used. They are broad enough to include all pecuniary liabilities and obligations of the bank. Indeed, that is a well-recognized meaning of the word "engagement." Plaintiff's claim is for the money the bank fraudulently got from him and used in its business. Clearly that liability is covered by the phrase "contracts, debts and engage-

[10] McClure v. Central Trust Co., 165 N. Y. 108, 128.

[11] See Forrest v. Jack, 294 U. S. 158, 162, and cases cited.

ments."[12] The construction for which the defendant contends cannot be sustained.

4. There remains the question whether plaintiff's judgment is entitled to share equally in the receivership estate with other unsecured creditors' claims.

In 1930 when the bank by false representations sold him the stock and by that means obtained the price out of his deposit it immediately became bound to make restitution.[13] The fraudulent sale was subject to recission by the plaintiff at any time before the bank closed. Neither lapse of time while plaintiff remained ignorant of the fraud nor insolvency of the bank detracted from its liability. We assume that after March 3, 1933, the bank was without means sufficient to meet current demands and that its debts exceeded the value of its assets plus the statutory liability of its stockholders. After the appointment of a conservator, but some months before the comptroller declared the bank insolvent, plaintiff rescinded and brought this suit. He claims no lien, preference, or priority but merely seeks to share in the estate as do other unsecured creditors.

While stockholders' liability may not be enforced before insolvency and assessment by the comptroller, we assume without deciding that plaintiff's position is the same as if the bank's insolvency had been declared and a receiver appointed before he rescinded. Plaintiff appeared by the bank's records to be a stockholder and, as against creditors for whose benefit the statutory liability was created, was estopped from denying that status.[14] Recognizing that the bank's fraud and his rescission availed nothing against the comptroller's assessment, plaintiff paid the amount laid against him. The judgment he seeks would establish his right to have the bank pay, because wrongfully obtained from his deposit, the amount for which this suit is brought. And, having fully paid his liability to the creditors, there is no reason why his claim should be sub-

[12] See e. g. Chesapeake and Ohio Canal Company *v.* Knapp, 9 Pet. 541, 566. United States *v.* State Bank, 96 U. S. 30, 35-36. Thomas *v.* Matthiessen, 232 U. S. 221, 235. Haviland *v.* Chace, 39 Barb. 283, 287.

[13] Cf. Briggs *v.* Brushaber, 43 Mich. 330, 332. Northrop *v.* Hill, 57 N. Y. 351, 356. Trayne *v.* Boardman, 207 Mass. 581, 582. Sollund *v.* Johnson, 27 Minn. 455, 456. Union Central Life Insurance Company *v.* Schidler, 130 Ind. 214, 216. Griffin *v.* Lumber Co., 140 N. C. 514, 517. McKay *v.* McCarthy, 146 Ia. 546, 550-551.

[14] Scott *v.* Deweese, 181 U. S. 202, 213. Lantry *v.* Wallace, 182 U. S. 536, 553.

ordinated to claims of stockholders on account of their deposit balances when the bank failed. The record shows that plaintiff then had a substantial amount on deposit. The bank does not claim that, in respect of deposits or other indebtedness, stockholders are not entitled to distribution on the same basis as are non-stockholding creditors. There is no foundation for any such rule. Subscription price having been fully paid to the bank, the maximum for which stockholders may be held for the benefit of creditors is the par value of their shares. By payment of the comptroller's assessments they fully discharge their liability as stockholders. And as claimants they stand on the same footing as other creditors.[15] Discrimination against their claims is not authorized by the statute. It follows that plaintiff's judgment is entitled to rank on a parity with other unsecured creditors' claims.[16]

The judgment of the Circuit Court of Appeals will be reversed and the case will be remanded to the district court for further proceedings in accordance with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[15] Richardson *v.* Olivier, 105 Fed. 277, 280.

[16] Salters *v* Williams, 244 Fed. 126, 129. Florida Land & Imp. Co. *v.* Merrill, 52 Fed. 77, 80. Williams *v.* Green, 23 F. (2d) 796, 797. Clark *v.* Boston-Continental Nat. Bank, 84 F. (2d) 605, 607.